SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1851.

No. 18.

WILLIAM A. SWEET AND MARIA H. SWEET, [illegible] G. TALLMAN AND FILED H. [illegible], PLAINTIFFS IN ERROR,

vs.

CHRISTIAN RECHEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS.

FILED APRIL 6, 1852.

(14,768.)

(14,568.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 122.

WILLIAM A. SWEET AND MARIA H. SWEET, HIS WIFE, AND FRANK G. TALLMAN AND PELEG H. TALLMAN, PLAINTIFFS IN ERROR,

vs.

CHRISTIAN RECHEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	2	1
Caption	3	2
Declaration	4	2
Answer	4	2
Statement of the case	5	3
Exhibit A—Will of Peleg Tallman, &c.	14	13
B—Petition and order for appointment of guardian of Peleg Tallman	22	20
C—Report of committee of appraisers and order thereon	23	21
Appointment and oath of appraisers	24	21
D—Petition of Charles McIntier, guardian, and order thereon	25	22
E—Order granting leave to guardian to sell real estate, &c	26	23
F—Bond of guardian to sell real estate, &c.	27	24

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 31, 1894.

	Original.	Print
Exhibit G—Petition of guardian for leave to file affidavit of notice, &c	28	25
H—Deed from guardian to Henry Tallman, March 25, 1844	30	27
I—Deed from Henry Tallman to McIntier, guardian, March 25, 1844	31	28
J—Deed from Henry Tallman to Robert Knott, October 4, 1844	33	29
K—Petition of H. L. Richardson and order on McIntier to answer	34	31
L—Deed from Robert Knott to Christian Rechel, May 17, 1869	35	31
M—Deed of release from Robert Knott to city of Boston, March 14, 1870	37	33
Judgment	38	34
Opinion	39	34
Assignment of errors	42	36
Clerk's certificate	43	36
Bond	44	37
Citation	45	37
Proof of service of citation	46	38

1 UNITED STATES OF AMERICA, *ss:*

Seal of the Circuit Court, Massachusetts.

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between William A. Sweet and Maria H. Sweet, his wife, and Frank G. Tallman and Peleg H. Tallman, all of Syracuse, Onondaga county, New York, plaintiffs, and Christian Rechel, of Boston, county of Suffolk, in the district of Massachusetts, defendant, in a plea of land, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twenty-fourth day of January, in the year of our Lord one thousand eight hundred and ninety-one.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
THOS. L. NELSON, *Judge.*

2 Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS, *ss:*

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal of the Circuit Court, Massachusetts.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this first day of April, A. D. 1891.

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, *Massachusetts District*, } ss:

At a circuit court of the United States for the first circuit begun and holden at Boston, within and for the district of Massachusetts, on Monday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

Before the Honorable Le Baron B. Colt, circuit judge.

4 WILLIAM A. SWEET and MARIA H. SWEET, His Wife, and Frank G. Tallman and Peleg H. Tallman, all of Syracuse, Onondaga County, New York, and Citizens of United States and Citizens of and Residents in the State of New York, Plaintiffs,

v.

CHRISTIAN RECHEL, of Boston, County of Suffolk, a Citizen of the United States and a Citizen of and Resident in the State of Massachusetts, in the District of Massachusetts, Defendant.

In a plea of land.

Wherein the said William A. Sweet, Maria H. Sweet, Frank G. Tallman, and Peleg H. Tallman demand against the said Christian Rechel a certain parcel of land, with the privileges and appurtenances thereto belonging, in said county of Suffolk, in said district, bounded and described as follows, to wit: Northerly on Tennyson street, thirty-five feet; westerly, fifty feet; southerly on land now or formerly of Mrs. Blake; easterly on land now or formerly of Parker and J. N. Howe, or however otherwise bounded and described, being premises numbered eighteen and twenty on Tennyson street, in said Boston, and situated in block 406 of ward 11, according to the plans and maps of said city, of which premises so demanded the said defendant unjustly disseized the said plaintiffs within twenty years last past; whereupon the said plaintiffs say that within twenty years last past they were seized of the said parcel of land, with the rights, easements, privileges, and appurtenances thereto belonging, in their demesne as of fee, of which the said defendant disseized them as aforesaid—

To the damage of the said plaintiffs, as they say, — the sum of eight thousand dollars.

The writ in this cause is dated the thirtieth day of September, A. D. 1885, and was duly entered at the October term of this court, A. D. 1885, when and where the parties appeared by their respective attorneys.

This cause was thence continued from term to term to the May term, A. D. 1887, when the following answer was filed:

Answer.

(Filed May 18, 1887.)

And now comes the defendant and denies each and every allegation in plaintiffs' writ and declaration, and he says that the land

described in plaintiffs' writ, with other lands, was taken by the city of Boston, on or about the ninth day of May, in the year 1868, under the power and authority given to it by chapter 308 of the acts passed by the general court of Massachusetts in the year 1867, and thereby the fee in said land described in said writ became absolutely vested in said city; and afterwards, on the fourteenth day of March, in the year 1870, said city conveyed said land in fee to this defendant, and he still continues to hold the same under such conveyance.

By GEORGE B. BIGELOW,
His Attorney.

This cause was thence continued from term to term to the May term, A. D. 1888, when the following agreed statement of the case was filed:

Statement of the Case.

(Filed July 10, 1888.)

This is a writ of entry brought to determine the title of certain real estate situated in the city of Boston. The plaintiffs claim title to the real estate in question in the following manner, viz: Peleg Tallman, of Bath, in the county of Lincoln and State of Maine, died on the 12th day of March, A. D. 1840, seized and possessed of certain real estate situated in Boston, part of which is involved in this present suit, leaving a last will and testament, under the following clause of which he devised this real estate, viz:

"Item 16. I give, devise, and bequeath to my son, Henry Tallman, three dwelling-houses, situate on the southerly side of Pleasant Street court, in Boston, one lot of land, situate on the southerly side of Pleasant Street court, bought by me from Joseph N. Howe; one other lot of land on the same side of said street bought by me of Mrs. Parker, to hold to said Henry during his natural life, and at his decease to descend to his son, Peleg Tallman, Jr."

The will was proved and allowed in the county of Lincoln, Maine, March 29, 1841, and a copy thereof in the probate court of Suffolk county, Mass., May 10, 1841. (See Exhibit "A.")

Henry Tallman died May 4, 1885, aged 79 years, 9 months.

Peleg Tallman, his son, and the grandson of Peleg Tallman, Sr., was born April 18, 1836, and died April 15, 1863, in his twenty-seventh year, leaving a widow, Maria H., the present wife of William A. Sweet, and two children, Frank G. Tallman and Peleg H. Tallman, who are the present plaintiffs in this suit.

Frank G. Tallman was born January 26, 1860, and became of age January 25, 1881.

Peleg H. Tallman was born October 13, 1862, and became of age October 12, 1883.

At the time of Peleg Tallman's death Henry Tallman, under and by virtue of the will of Peleg Tallman, Sr., became possessed of this estate for and during his life, and Peleg Tallman, his son, became entitled to and vested with the remainder in fee.

Peleg Tallman, Jr., was a minor at the time of his grandfather's

death and did not become of age until the 17th day of April, 1857.

The probate records and records of deeds of the county of Suffolk, Massachusetts, disclose the following, viz:

A copy of the will of Peleg Tallman (Sr.) was presented for probate, accompanied by a petition of Henry Tallman, of Lincoln county, Maine, one of the executors named in the will, for the issuing of letters testamentary to him, Eleanor Tallman, the
6 executrix named in the will, declining to act, and on May 10, 1841, the copy of the will was ordered filed and letters testamentary were issued to Henry Tallman, who gave a bond in the sum of $50,000, which was duly approved by the judge of probate for said Suffolk county.

On October 6, 1843, a petition for guardianship of Peleg Tallman, signed by Charles McIntire, approved by Henry Tallman, appears, which, on October 9, 1843, was granted; bond in the sum of $1,000, signed by Charles McIntire, broker, principal, and Thomas Darling, surety, was approved by the court, and letters of guardianship of the same date were issued to Charles McIntire. (See Exhibit "B.")

On November 13, 1843, Charles McIntire, as guardian of said Peleg, filed the inventory of the estate of his ward, said Peleg Tallman, and included therein the following, viz: "A lot of land on Pleasant Street court, measuring on said court about 147 feet, westerly on Church street about 50 feet, southerly, on land of Mrs. Blake, about 147 feet, and easterly, on land of James N. Howe and Deborah Parker, about 50 feet, with two brick houses and one wooden house on the same, the rest of the lot being unimproved, the said minor being entitled to the same after the death of his father, who has a life estate therein."

Amount of real estate, $11,500; minor's interest valued at $1,500.

LEMUEL P. EATON,
A. G. BAXTER,
H. MORRISON,
Committee.

This inventory was duly sworn to, and was accepted by the court and ordered filed. (See Exhibit "C.")

On November 27, 1843, Charles McIntire, guardian of Peleg Tallman, petitioned the probate court for said county of Suffolk, having jurisdiction of the subject-matter, for leave to sell the real estate of his said ward—the description being the same as in the inventory above—alleging that said houses were decaying and going out of repair, and were depreciating, and would continue to depreciate in value on that account, and the residue of the land was unimproved land, and, accordingly, that it would be for the interest of the minor that his said real estate should be disposed of and the proceeds invested, etc. The probate court ordered him to give notice to the next of kin and all persons interested in the estate by publishing the petition, together with the order of the court, in the Boston Courier for three successive weeks before the twenty-fifth of December following, the last publication to be three days, at least, before the said twenty-fifth of December. (See Exhibit "D.")

It is admitted by the defendant, if the same would be competent in evidence, that a file of the Boston Courier for the year 1843 is contained in the public library of Boston, and that the papers in that file contain copies of the above notice under date of November 29, and December 13, 1843, and under no other date.

Under date of December 25, 1843, the guardian made return of the order into court and made oath before the judge of probate that he had complied therewith. (See Exhibit "D.")

Under the same date the court granted him license to sell
7 upon his giving bond and taking oath required by law (see Exhibit "E"), and at the same time he gave bond, with Thomas Darling, surety, in the sum of $3,000, which was approved by the court, and he also took the oath as required. (See Exhibit "F.")

In pursuance of said license, Charles McIntire, said guardian, gave a notice of the time and place of intended sale, as appears in Exhibit G, and at the time and place appointed in said notice he sold at public auction, March 20, 1844, to Henry Tallman, the father of said Peleg, his ward, for $1,400, the interest of his said ward in the whole of this property, a part of which is involved in this suit. (See Exhibit "G.")

The deed of said guardian to said Henry Tallman bears date March 25, 1844, and recites the foregoing facts about license, bond, oath, notice, and sale, and recites that the premises are subject to the life estate of said Henry Tallman and any incumbrances imposed by Peleg Tallman's will. Said deed was duly delivered to said Henry and was recorded with Suffolk county deeds October 7, 1844. (See Exhibit "H.")

On April 13, 1857, evidence of the sale to Henry Tallman of March 20, 1844, was perpetuated by said Charles McIntire by filing in said probate court and by its leave his affidavit thereof, and that he gave notice of the time and place of intended sale in the Boston Courier, according to the order of the court, and he annexed a copy of the advertisement thereof. (See *ante*, Exhibit "G.")

By mortgage deed dated March 25, 1844, and recorded April 18, 1844, Henry Tallman mortgaged about one-fourth part of this property (not the lot in question) to Charles McIntire, guardian of Peleg Tallman, for $1,300, the deed reciting that the mortgage was given to secure the note of Henry Tallman, payable in two years, with interest at six per cent., payable annually. (See Exhibit "I.")

On October 4, 1844, Henry Tallman conveys to Robert Knott, who purchased in good faith the property involved in this suit for $2,900 by warranty deed, with full covenants of warranty and against incumbrances. (See Exhibit "J.")

The guardian of said ward, Peleg, Charles McIntire, did not account for the proceeds of the sale of the interest of his said ward in this property to Henry Tallman either to the probate court of the county of Suffolk or to his said ward, Peleg, although on October 31, 1853, he was cited by said probate court so to do. (See Exhibit "K.")

No account of the proceeds of said sale was ever made.

On May 17, 1869, Robert Knott conveyed by warranty deed the

lot in suit to Christian Rechel, the defendant, for the sum of $4,800, which was paid in cash or its equivalent. (See Exhibit "L.")

The deed excepted from the covenants any claim which the city of Boston might have had for any betterment. Said Rechel bought the premises in good faith, for full value, without notice of any alleged defect in his title, and has erected buildings and made improvements at a cost of $8,575.

He occupied the premises from spring of 1860 till the date of the purchase as tenant to said Robert Knott, and has been in peaceable, uninterrupted possession of the premises from that time to the present, excepting as the same was taken by the city of Boston, as hereinafter stated.

No demand has ever been made upon him by any one for
8 rent or an accounting for rent until this suit was brought, and no notice has ever been given him of any claim adverse to his own except by the city of Boston, as hereinafter stated.

The section of territory in which this lot of land lay during the decade between 1860 and 1870 had come to be injurious to the public health, inasmuch as its grade was lower than the surrounding territory, and it was incapable of being properly drained. Various plans were suggested for the raising of the grade and the proper drainage thereof, and finally the legislature passed an act entitled "An act to enable the city of Boston to abate a nuisance existing therein, and for the preservation of the public health in said city," which was approved June 1, 1867, and is chapter 308 of the acts of the general court of Massachusetts passed in the year 1867, viz:

"SECTION 1. The city of Boston may purchase or otherwise take the lands or any of them in said city, with the buildings and other fixtures thereon, situated and lying within the district bounded on the northwest by the northwesterly line of Columbus avenue, extended to Church street; on the north by the line of the southerly side of the passenger station of the Boston and Providence Railroad corporation, and the same extended to the westerly line of Church street; on the east by Pleasant St., on the southeast and south by Tremont street and the Boston and Worcester railroad; and on the west by Ferdinand street. Said city shall within sixty days from the time they shall take any of the said lands, file in the office of the registry of deeds for the county of Suffolk, a description of the land so taken as certain as is required in a common conveyance of lands; and a statement that the same are taken pursuant to the provisions of this act, which said description and statement shall be signed by the mayor of said city; and the title to all land so taken shall vest in the city of Boston, and if any party whose land is taken shall agree with the said city upon the damage done to him by the said taking, the same shall be paid to him by the said city forthwith. And it shall be the duty of the city of Boston forthwith to raise the grade of said territory so taken or purchased, laying out and filling up the same with good materials, with reference to a complete drainage thereof, so as to abate the present nuisance and to preserve the health of the city, and in nowise to affect injuriously the lands of

the Commonwealth or its grantees in the back bay, or the system of drainage therein.

SECTION 2. Any person entitled to any estate in any part of the land so taken, may at any time within one year from the time when the same shall be taken, as well in his own behalf as in behalf of all other persons having estates in the land so taken, file a bill in equity in the supreme judicial court in the county of Suffolk, setting forth the taking of the complainant's land, and the condition of the same in respect to its capacity for drainage and whether the complainant claims any and what damages against the city of Boston, or the Boston Water Power Company, or any other corporation or person, by reason of any and what wrongful act or omission by their causing a diminution in the value of his land at the time of said taking, and praying an assessment of damages against such parties. And upon the filing of such a bill, the said court shall cause notice of the pendency of said bill to be given to the parties named therein as defendants, according to the course of courts of equity, and also public notice thereof, to all persons in whose behalf such bill shall be filed, to appear and become parties thereto, if they shall think fit to do so. Said court shall prescribe how such public notice shall be given, and what length of time shall be allowed for appearing and becoming a party to such suit. Any party failing so to appear and become a party within the time prescribed by the court shall be forever barred from recovering any damages on account of such taking. Each person so appearing and becoming a party shall file a written description of the land in which he claims an estate, together with a plan thereof, so as clearly to distinguish the same from all other lands, and shall also declare what estate he claims therein. If he claims that the value of said lands at the time of taking the same was lessened by any unlawful act or omission of the city of Boston, or the Boston Water Power Company, or any other corporation or person, so that the value of the land in its condition when taken would not be a just compensation for all the estate and rights of the party in and in reference to the same, such party shall also state what such injury is, and how and by whom the same had been or is caused, and what right or title of the party is violated, and what amount of damage in gross is claimed by him as compensation therefor from each of the parties defendant."

Other sections of the act which may be referred to provided for the appointment of three commissioners to hear the parties, after due notice, and assess the value of the land taken, and to report to the court of their doings, with provision that in case any party was aggrieved by their report he might except thereto and have his exception heard by the court as in a suit in equity, or might apply to the court for the framing of proper issues to be tried by a jury, and for a decree and execution for damages when they should be finally determined.

As to the action taken by the city of Boston, it appears that a joint special committee was appointed, and in their report to the

board of aldermen, dated April 13, 1868, they recommended this plan, viz:

1. To take all the territory below the grade hereinafter mentioned within the district described in chapter 308 of the acts of the year 1867.

2. To raise the streets and places to the grade of eighteen feet above mean low water.

3. To fill the cellars, back yards, and vacant lots to the grade of twelve feet above mean low water.

4. To raise and underpin such of the buildings as the commissioners hereinafter mentioned shall deem expedient.

5. To relay water pipes, sewers, and edgestones.

6. To give bonds to the former owners to return the estates (or such portions as are not required for streets or other purposes) after the above-mentioned improvements have been made, provided said former owners will make all necessary repairs upon the estates returned to them after the raising and underpinning, and make no claim upon the city for damages.

7. To appoint three commissioners who shall, under the direction of a committee of the city council, have general supervision of the work. (See City Document No. 41.)

In the records of the board of aldermen appears a record of the following instrument, from which we quote so far as it affects this estate, viz:

"In board of aldermen, April 13, 1868.

Whereas by an act of the legislature of the Commonwealth of Massachusetts, passed the first day of June, A. D. 1867, entitled 'An act to enable the city of Boston to abate a nuisance existing therein, and for the preservation of the public health in said city,' it is provided, among other things, as follows, viz:

'SECTION 1.' * * * (See *supra*.)

Now therefore, know all men by these presents, that the said city of Boston, by virtue of the power and authority in said act given, and pursuant to the provisions thereof, has taken and by these presents does take the following-described parcels of land, with all the buildings and fixtures thereon, situated within the limits described in said act, in said city of Boston, viz:

A parcel of land belonging to Robert Knott, bounded as follows, viz: Northwardly by Berlin street thirty-five and sixty one-hundredths (35.60) feet; westwardly and southwardly by land of Horatio Harris on two lines fifty (50) feet and thirty-three and sixty one-hundredths (33.60) feet, and eastwardly by land of Charles W. and James C. Monroe and by land of the heirs of Joshua Bennett on two lines twenty-six and seventy-five one-hundredths (26.75) feet and twenty-three and thirty-three one-hundredths (23.33) feet containing seventeen hundred and fifty (1,750) square feet more or less.

The said parcel- of land are shown on plans made by Thomas W. Davis, city surveyor, numbered respectively 1, 2, 3 & 4, each bearing date April 6, 1868, and deposited in the office of the said city surveyor.

To have and to hold the same to the said city of Boston, its successors and assigns, to its and their sole use and behoof forever, agreeably to the provisions of the said act.

In board of aldermen, April 20, 1868.

Passed; sent down for concurrence.

GEORGE W. MESSINGER, *Chairman.*

In common council, May 7, 1868.

Passed in concurrence.

CHARLES H. ALLEN, *President.*

I, Nathaniel B. Shurtliff, mayor of the city of Boston, do hereby approve of the foregoing instrument and of the action of thy city council in the premises, and, in accordance with the provisions of the act referred to in said instrument, I hereby certify that the lands described in said instrument were and are taken pursuant to the provisions of the said act.

In witness whereof I have caused the corporate seal of the city of Boston to be hereto affixed and have hereto set my hand this ninth day of May, in the year of our Lord one thousand eight hundred and sixty-eight.

[CITY SEAL.] NATH'L B. SHURTLIFF,
Mayor of the City of Boston.

11 This instrument was duly executed, and within sixty days of the taking of the land, to wit, on May 22, 1868, was filed in the Suffolk registry of deeds, and an extended record was made in Book 938, folio 121 *et seq.*, September 21, 1868, and the facts therein stated are true.

It is admitted that the city of Boston took the land involved in this suit in accordance with a provision of said statute, and that the premises are now held by the defendant as grantee from said Knott and the city of Boston; also that the city of Boston forthwith performed the duty imposed on it by the statute at an immense outlay. The grade of the land was raised and the buildings thereon, the territory was laid out and filled, a complete and effective system of drainage was provided, the nuisance abated, and the value of the land was greatly enhanced.

The lot in suit was filled to a depth of several feet, the buildings were raised and underpinned, and the value increased.

On May 28, 1868, a joint special committee was appointed by the board of aldermen and common council of the city of Boston, consisting of Aldermen Joseph F. Paul, Benjamin James, Francis Richards; Councilmen Samuel Rice, Ivory Bean, Samuel B. Hopkins, Alexander Wadworth, John W. Leighton.

Approved 29 May, 1868.

NATH. B. SHURTLIFF, *Mayor.*

On June 8, 1868, Joel Wheeler, Joseph Smith, and James H. Freeman were appointed commissioners by the said board of aldermen and city council in concurrence of this Church Street district.

On November 23, 1868, there appears the following, viz:

Board of aldermen.

Ordered, that the commissioners, under the direction of the joint special committee on said district and with the approval of his honor the mayor, be authorized to settle and adjust damages for the taking of lands in the Church Street district, so called, with the former owners thereof severally upon such terms and conditions as they shall deem expedient, and in making such settlements the mayor is authorized to reconvey the several parcels of land so taken or any part thereof.

Approved 24 November, 1868.

NATH. B. SHURTLIFF, *Mayor.*"

On file in the city auditor's office in Boston appears the following, viz:

City of Boston.

In committee on the Church Street district.

NOVEMBER 19, 1869.

Voted, that the commissioners on the Church Street district be directed to settle with Robert Knott for all damages occasioned by taking estate No. 18 Berlin street, under the authority of chapter 308 of the acts of the year 1867, by reconveying said estate in its present condition to said Robert Knott or his assignee, with — square feet of land added in the rear from land formerly of 12 Horatio Harris, as shown on a plan made by the city surveyor, in consideration of his paying one dollar and seventy-five cents per square foot for extra land added in the rear; also the assessment for betterment and any charges for extra work, and giving to the city a release and discharge in full for all damages, costs, and expenses for or on account of said taking, and for all claims and demands occasioned by imperfect drainage of said estate.

Attest: JAMES M. BUGBEE,
Clerk of Committee.

Assessment for betterment on 1,750 square feet, at 50 cts..	$875 00
23 square feet added in rear, at $1.75.....	40 25
Due the city	$915 25

Office Church Street district commissioners, 373 Tremont street.

BOSTON, *January* —, 1870.

The commissioners have agreed upon a settlement with the assignee of Robert Knott upon the terms mentioned in the foregoing vote of the committee; said assignee to pay the sum of nine hundred and fifteen dollars and twenty-five cents for betterment to the

estate from the widening of Berlin street and for extra land added in the rear.

FRANCIS RICHARDS.

MAYOR'S OFFICE, CITY HALL,
BOSTON, 12 *January*, 1870.

Approved:

NATH. B. SHURTLIFF, *Mayor.*

On March 14, 1870, Robert Knott gave to said city a release. (See Exhibit "M.")

And on March 14, 1870, the city of Boston gave to said Rechel, the defendant, the following deed, which was recorded in the Suffolk registry of deeds, Book 996, folio 191.

Know all men by these presents: That the city of Boston, in consideration of a release of all damages for taking the real estate last therein described bearing even date herewith and executed to said city of Boston by Robert Knott, of Charlestown in the county of Middlesex and Commonwealth of Massachusetts and of
13 the sum of nine hundred fifteen and $\frac{25}{100}$ dollars paid to said city by Christian Rechel of Boston in the county of Suffolk and said Commonwealth the delivery and receipt whereof are hereby acknowledged, doth hereby remise, release and forever quitclaim unto the said Rechel his heirs and assigns forever, a certain parcel of land with the buildings thereon situated on Tennyson (formerly Berlin) street in said Boston and bounded and described as follows, viz: Northwardly by the southerly line of Tennyson street there measuring thirty-five and sixty one-hundredths (35.60) feet; eastwardly by land late of the heirs of Joshua Bennett, and by land late of Charles W. and James C. Monroe on three lines, twenty-three and thirty-three one-hundredths (23.33) feet, twenty-six and seventy-five one-hundredths (26.75) feet, and one foot and twenty-five one-hundredths (1.25) of a foot; southwardly by land late of Horatio Harris twenty and forty one-hundredths (20.40) feet; westwardly by the same, one (1) foot and five one-hundredths ($\frac{5}{100}$) of a foot; again southwardly by the same thirteen and twenty one-hundredths (13.20) feet; and westwardly again by other land late of said Harris, fifty (50) feet.

Containing seventeen hundred and seventy-three (1,773) square feet more or less. The taxes on the described premises for the year eighteen hundred and sixty-nine are to be paid by said Rechel, his heirs or assigns.

Being parts of the same real estate which was taken from said Knott and from said Harris by said city of Boston under the provisions of the 308th chapter of the statutes of said Commonwealth of the year 1867 by an instrument recorded with Suffolk deeds, Liber 938, folio 121.

To have and to hold the above-released premises with the privileges and appurtenances thereto belonging to the said Christian Rechel, his heirs and assigns, to his and their own use and behoof forever.

In witness whereof the said city of Boston hath caused its common seal to be hereunto affixed and these presents to be signed by Nathaniel B. Shurtliff, mayor of the said city hereto duly authorized.

Dated this fourteenth day of March in the year of our Lord one thousand eight hundred and seventy.

CITY OF BOSTON,
By NATH. B. SHURTLIFF, *Mayor*,

And the city seal.

Signed, sealed, and delivered in presence of—
CHAS. E. DAVIS, JR.

Approved:
C. F. KITTREDGE,
Assistant City Solicitor.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

19 MARCH, 1870.

Then the above-named City of Boston appeared, by Nathan-
14 iel B. Shurtliff, its mayor, and acknowledged the foregoing instrument to be the free act and deed of said city.

Before me—
CHAS. E. DAVIS, JR.,
Justice of the Peace.

Recorded April 12, 1870.
The taxes for 1869 were paid by said Rechel.

It is admitted by the defendant that no compensation was ever paid by the city of Boston to the plaintiffs in this suit by reason or on account of the proceedings under the above-named act of June, 1867, chapter 308.

It is agreed that the foregoing statement, together with the exhibits therein referred to and herewith filed, shall be taken as the facts in the case.

It is agreed that in 1869 a bill in equity was brought under the statute reported in 109 Mass., 438, the case being Cobb *v.* Boston, on behalf of Cobb and all others entitled to have damage assessed for this taking; that this case was pending in the supreme court until the April term, 1882; that it was ordered by the court in this case that the time from Dec. 23, 1869, to first Tuesday of April, 1870, be allowed to parties to bill; that notice was published in papers on said order, and that such persons as came in had their damages assessed under said bill.

THOMAS A. JENCKES,
For Plaintiffs.
SAMUEL J. ELDER,
For Defendant.

Exhibit A.

Be it remembered that I, Peleg Tallman, of Bath, in the county of Lincoln and State of Maine, Esquire, being of sound disposing mind and memory and reasonable bodily health, taking into consideration the uncertainty of this mortal life, do make and publish this my last will and testament, hereby revoking all former wills by me made.

Item first. I devise unto my beloved wife, Eleanor Tallman, all and singular my real estate in the town of Bath not otherwise disposed of at the time of my decease to hold during her natural life.

2d. I give and bequeath unto my said wife, Eleanor Tallman, all sums of money that may be due and owing unto me from Thomas Tileston of Boston at my decease, and also all my household furniture and plate that may be found in the town of Bath at my decease; also all my horses, carriages, sleighs, harnesses and other tools and tackling used about my house, garden and barn in Bath, also my wearing apparel.

3rd. I give, devise and bequeath unto my said wife Eleanor the following mortgages and notes secured by the same, to wit: Jonathan Patten's, of Boston, note and mortgage for eight thousand dollars. Charles McIntire's and others of Boston note and mortgage for four thousand dollars, and in case of the failure of the above securities or any part of the same, I will and bequeath to her out of my other personal estate so much as such failure may be, that the amount of said bequests may be realized by her in value, with power to bequeath the same by her last will to any person or persons in my and her family, and our descendants, children or grandchildren but the same not to be willed or given by her to any other person or persons or association of people or body corporate.

Also I give and bequeath unto my said wife the sum of five hundred dollars in cash for pocket money.

4th. I will and devise, that should my said wife Eleanor survive me that she have full power and authority to devise by her will the following part or portion of my real estate, situate in the town of Bath bounded as follows: Beginning on the west side of Front street, on the dividing line, between my homestead lot and land now in possession of William Torrey; thence northerly on the west side of Front street as the street runs, to the late James W. Lemont's land; thence westerly turning and running on the south side of said Lemont's land to William Rouse's land; thence running southerly along said Rouse's land and along the south side of Ammi R. Mitchell's land to Washington street; thence southerly by the eastern side of Washington street to land in possession of William Torrey; thence easterly by the north line of said Torrey's land to Front street and to the first bounds, or however otherwise bounded, with the Dexter Brown house, and mansion house and outbuildings standing thereon, but should she so devise the same, the devise is limited by me in the same way I have willed in the third item of this my will.

5th. I give and bequeath unto my son Scott I. Tallman all sums of money which he may owe me at my decease.

6th. I give and bequeath the sum of four hundred dollars annually for the support of my son Benjamin F. Tallman his wife and family, the said sum to be paid as near quarterly as circumstances will permit to the wife of said Benjamin F. Tallman so long as they both shall live and in case of the decease of my said son Benjamin, living his wife, said sum to be paid to her so long as she remains his widow and unmarried: and in case of her marriage, this annuity is to cease; the same to be paid by my son Henry and his son Peleg Tallman, Jr., out of bequests made by me to them, in this my will; and the receipt of the wife of said Benjamin shall be the only discharge for said annuity. And in case said Benjamin should survive his wife, then, in that case the judge of probate for the county of Lincoln is to appoint a trustee for the above purpose, who shall receive and pay out said sum to said Benjamin, as in his discretion he may judge best.

7th item. I give and devise to my said son James C. Tallman, during his natural life, the use and occupancy and improvement of the Gardiner's Neck farm in the town of Woolwich, with the following conditions, as to improving and cutting wood and timber on the same; he is to cut on the following part thereof and no other,
to wit: That part beginning at low-water mark on Kennebec
16 river, thence running easterly so as to pass by and adjoin the north side of the stone wall or fence which runs from said river easterly across the neck to the marsh or thereabouts; said wall or fence being a little northerly of the dwelling-house and little orchard on said farm, thence running from said river by the northerly side and adjoining said wall or fence two hundred and fifty feet on the slope of the bank and land; thence turning and running north five degrees west by compass till it strikes the dividing line between my land and land of the late Samuel Preble; thence westerly by said line to Kennebec river; thence southerly by Kennebec river to the first bounds. To hold the said farm to the said James during his natural life, and at his decease, I will that the same descend to his oldest surviving son, if he leave one, and if not, to his two oldest daughters equally, and in case he has but one daughter, then to descend to her, and on failure of heirs of his said body on the part of said James, then said real estate is to descend to the oldest surviving son of said Benjamin F. Tallman, provided said son be a steady temperate man at the age of twenty-one years. If not, then said real estate is to descend to the two oldest daughters of my said son Benjamin F. Tallman, or to the survivor of them, and in case my said son James should die and leave his present wife his widow, I will and order that so long as she remains his widow and unmarried, that she shall have a living on the above-named farm, and that the dwelling-house now occupied by them on the farm, shall be equally divided and she shall have the use of whichever half she may select.

8th. I give and bequeath to my said son James all the cattle, sheep, swine and other stock, farming tools and tackling household furni-

ture and other stock and personal things, being on the Gardiner's Neck farm in Woolwich belonging to me at the time of my decease.

9th. I give and devise to my son James C. Tallman all my real estate situate in the town of Newburyport, being a piece of land with a three story dwelling-house and outbuildings thereon standing and the same bought by me of Robert Elwell, as by his deed will appear.

10th. I give, bequeath and devise to my said son James C. Tallman a certain note and mortgage of real estate in Boston, given by Calvin Knowlton, and assigned to me by John Preston, also another note and mortgage of real estate in Boston, assigned to me by Mrs. Channing for eighteen hundred dollars. The Knowlton note and mortgage five thousand five hundred dollars and in case said mortgages are redeemed, before my decease then I give said James this amount. Also I give to said James the privilege of cutting old and decayed wood on the Gardiner's Neck farm, and to the southward of the dwelling-house thereon occupied by him, for the use of his fire only.

11th. I give and bequeath and devise to my daughter Elizabeth, wife of William Patten a note of hand and mortgage due me from her amounting, including interest to about seven thousand, three hundred and sixty dollars or thereabouts; also a note of hand due me from the late Horatio Smith, amounting to about five hundred and twenty dollars. Also the sum of three hundred dollars in cash for pocket-money.

12th. I give and devise to my daughter Maria T. Tileston,
17 wife of Thomas Tileston, a piece of land with the brick dwelling-house thereon standing, situate in the city of Boston bounded on the northwest by Purchase street on the southwest by land sold by me to the family of Thomas Hill; on the northeast by land owned by the widow Mary Tileston and on the southeast by said Mary's land. Also a dwelling-house numbered (20) twenty, on Orange street in Boston, with the outhouses and land, said first-named dwelling-house now under lease to, and occupied by I. G. Hallett. Also a brick building consisting of three tenements, with the land belonging to the same, situate in said Boston, upon a lane, westerly from Sea street, and the same sold me by Noah E. Chase, reference for particulars to be had to Chase's deed to me, all said devises to my said daughter being on condition that I am the owner of said property at the time of my decease. To have and to hold the same to said Maria, her heirs forever, and on condition, that the same or any part thereof, or of the income, rents and profits shall never be subject to be taken, sold or any way disposed of for the payment of debts, except such debts as she, in her own person may contract, and her sole and own receipt shall be the only proper discharge for any rents, profits or income of said premises or any part thereof.

Item 13. I also give and bequeath to my said daughter Maria, the sum of five hundred dollars in cash for pocket-money.

Item 14. I give and devise to my daughter Caroline, wife of George Gardiner, that part of the old Tileston garden, so called, sit-

uate in the city of Boston, and bought by me from Thomas Tileston, situate between High street and bounded on said street on the southeast and on the northwest by High street, which contains and is occupied by four dwelling-houses as follows, viz: the old mansion wooden house and outhouses situate on the northwest side of Purchase street and now occupied by and under lease to Calvin Bailey, three brick houses situate on the southeasterly side of High street, one occupied by Charles Brown, one occupied by Jeremiah Peabody and one by William Sprague: to hold the said real estate to said Caroline for her natural life, and at her death, the same is to descend to her oldest son, in case she have one: otherwise to her oldest daughter, and in case said Caroline decease without children of her born, then I will and order that said devised estate descend to the children of my son Henry Tallman.

Item 15. I give and bequeath unto my said daughter, Caroline, the sum of five hundred dollars, in cash for pocket-money.

Item 16. I give, devise and bequeath to my son Henry Tallman all my real and personal estate that may be found on the island of Rhode Island and State of Rhode Island, belonging to me at my decease, to hold to him during his natural life, and at his decease to descend to his son Peleg Tallman, Jun. Also, three brick dwelling-houses, situate on High street in Boston, on land I bought of Doctor Benjamin Shurtliff, reference to be had to his deed to me for a more full description, also one three-story brick house on the southeast side of Purchase street and now occupied by Lemuel Crackborn; also one brick house No. (31) thirty-one on Orange street being the same which I bought of Mr. Wilde; three dwelling-houses, situate on the southerly side of Pleasant Street court in Boston, one lot of land situate on the southerly side of Pleasant Street court bought by *one* from Joseph N. Howe; one other lot of land
18 on the same side of said street bought by me of Mrs. Parker, to hold to said Henry during his natural life, and at his decease to descend to his son Peleg Tallman, Jr., except the dwelling-house and land before described, as occupied by Lemuel Crackborn, on Purchase street, which on the death of said Henry is to descend to his second son. Also I devise to my son Henry one house No. (2) two in Avery place, Boston, to hold to him during his natural life, and at his death, to descend to his said second son.

Item 17. I give and bequeath unto my nephew Ephraim Wilcox the sum of two hundred dollars in cash.

Item 18. I will and order that no legacy be paid as given by this will, till three months after my decease, nor shall the devisee or legatee be considered as entitled to any of the benefits of any gift or devise under this will till the end of three months after my decease.

Item 19. I will and order that after my decease the devises and bequests made by me to my son James, in my will, be on condition that he pay or cause to be paid, all taxes levied on the Gardiner's Neck farm in Woolwich now occupied by him.

20th. The bequests, devises and gifts I have made to my two sons James & Henry are made to my two sons James & Henry, are made to them, on condition and expressly; that they nor either of them

at any time, become the bondsmen or sureties for any person or persons whatever, after my decease, and in case they or either of them should do so, they shall in such case forfeit all bequests, legacies and devises given them in this my will.

21st. I give my library of books to my wife Eleanor Tallman, to be by her divided among my children, as she may think proper.

22nd. And lastly, I ordain and appoint my wife Eleanor Tallman, and my son Henry Tallman executors of this my last will and testament, making my son Henry Tallman sole legatee and devisee of all my estate not devised in this my last will and testament, willing and ordaining that my said executors shall give their own bonds jointly and severally to the judge of probate in such sum as he shall order without sureties.

PELEG TALLMAN (AND A SEAL).

Signed, sealed, published, and declared by the said Peleg Tallman to be his last will and testament, who in our presence executed the same, and we at his request and in his presence, and in the presence of each other, have hereunto set our hands as witnesses on this fourth day June, in the year of our Lord one thousand eight hundred and thirty-nine.

NATH. GROTON.
WM. ROUSE.
JAMES ROUSE.

I, Peleg Tallman of Bath in the county of Lincoln and State of Maine, esquire, being of sound disposing mind and memory, taking into consideration the uncertainty of life, and being desirous of disposing of my worldly estate in some respects different from the manner before done in my last will do make this as a codicil to said will and to control and overrule any gifts, legacies or devises so far as they are inconsistent with what I herein direct and order.

19

Item first. I hereby so far alter and control the provisions of the sixth article of my said will thus: I will and order that the annual sum of four hundred dollars, that I have bequeathed to the wife of my son Benjamin F. Tallman, to be paid to her as therein expressed, after the death of said Benjamin shall be paid to her for the period of ten years after the death of my son Benjamin and then, that my son Henry or his son Peleg pay her in lieu of any further sum, the sum of one thousand dollars.

Item 2d. To the seventh item in my original will, I make the following alterations and amendments: I give and devise to my son Henry Tallman, in trust, and for my son James C. Tallman, during the natural life of said James the Gardiner's Neck farm in Woolwich with three restrictions, instead of those expressed in said seventh item. That said James shall have the right of cutting wood and timber, on that part of the farm north of the dwelling-house thereon and on no other part of the same, sufficient to pay the taxes assessed on the same, and to pay all necessary labor on the same. Also I give to my son Henry in trust, for my son James, the notes

and mortgages mentioned in the tenth item of my will, instead of giving the same to him as stated in said tenth article; and at the decease of my son James I will and order, that said real estate named in the 7th article of my original will shall descend as therein expressed with this alteration: That said oldest surviving son of my son Benjamin, shall be and have been a steady temperate man till the death of my son James; and all other parts of said 7th item, not hereby altered or varied are to remain as they are.

Item 3d. I pledge and bind all the estate that I devised and bequeathed to my son Henry Tallman, or his children, in my will or by deed and to which this is a codicil, for the payment of the annuity and yearly sum, to my said son Benjamin F. Tallman and for the support of his wife and family as stated in the 7th item of my will and in the first of this codicil thereto, and for the further security of the payment of said annuity, I order that my said son Henry shall deposit the sum of seven thousand dollars in cash out of the legacies I have given him in my will for that purpose, which he is to do before he shall be entitled to said legacy or gift, and produce a certificate of such deposit, to be filed in the probate office for the county of Lincoln, as evidence of such deposit, which is to remain as pledged for that purpose, said deposit to be made in a good bond and mortgage with interest semi-annually.

Signed, sealed, published and declared by the said Peleg Tallman as a codicil and part of his last will and testament who in our presence executed the same, and we, at his request, and in his presence and in the presence of each other signed our names as witnesses to the same this twenty-ninth day of February, A. D. eighteen hundred and forty.

PELEG TALLMAN (AND A SEAL).

NATH. GROTON.
WM. ROUSE.
JAMES ROUSE.

20 STATE OF MAINE, } ss:
County of Lincoln, }

At a probate court holden at Bath in and for said county, on Monday, the twenty-ninth day of March, A. D. 1841, Eleanor Tallman and Henry Tallman, the executors named in the foregoing will, personally appear in court and signify the acceptance of the trust committed to them by the testator; whereupon I order that they be appointed executors of the foregoing will and codicil thereto, they first giving their own bond, jointly and severally, without sureties (agreeably to the will and direction of the testator), in the penal sum of fifty thousand dollars, and thereupon letters testamentary, with the will annexed, issue to them agreeably to law.

NATH. GROTON, *Judge.*

STATE OF MAINE, } ss:
County of Lincoln, }

Whereas the instrument hereunto annexed, with the codicil thereto, has been presented to me as the last will and testament of Peleg Tall-

man, late of Bath, in said county, by Eleanor Tallman and Henry Tallman, the executors therein named, and due notice thereof and of the time and place appointed by me for taking the probate of the same has been given to the heirs of said deceased and to all persons interested therein, pursuant to the order of court; and whereas it is proved to me by the testimony of Nathaniel Groton, William Rouse, and James Rouse, being the three subscribing witnesses thereto, that the said instrument was signed, sealed, and published by the said Peleg Tallman as his last will and testament, and that at the time of executing the same the said Peleg Tallman was of sane mind; and it further appearing to me that the same was attested in his presence by three credible witnesses, whose names are thereunto subscribed and to the codicil thereto—

I do, by virtue of the power and authority given me in and by the laws of the State aforesaid, hereby approve and allow of said instrument and the codicil thereto as the last will and testament of said Peleg Tallman, deceased, and order the same to be recorded.

Given under my hand and seal official at a court of probate holden at Bath, in said county, on this twenty-ninth day of March, in the year of our Lord one thousand eight hundred and forty-one.

NATH. GROTON,
[SEAL.] *Judge of Probate.*

I certify the foregoing as a true copy of the original will, codicil, and probate of the same.

JOHN C. DODGE,
Register of Probate for the County of Lincoln.

21 STATE OF MAINE, }
Lincoln County. }

Nathaniel Groton, Esquire, judge of the court of probate of wills and granting administrations within and for said county, hereby certify that John C. Dodge, Esquire, is the register of the court of probate for the county of Lincoln aforesaid, and that full faith and credit may and ought to be given to any certificate and attestation by him subscribed in his capacity aforesaid.

Given under my hand and the seal of said court, at Wiscasset, in said county of Lincoln, this fifteenth day of April, in the year of our Lord eighteen hundred and forty-one.

[SEAL.] NATH. GROTON,
Judge of said Court of Probate.

COMMONWEALTH OF MASSACHUSETTS, }
Suffolk, } *ss:*

At a probate court held at Boston, in said county, on Monday, the tenth day of May, in the year of our Lord one thousand eight hundred and forty-one.

The said Henry Tallman, having given public notice in pursuance of my order, which is now on file in said court, that the petition for filing and recording a copy of the will of Peleg Tallman,

late of Bath, in the county of Lincoln and State of Maine, esquire, with a copy of the probate thereof, would be acted upon here this day, being the time assigned for taking the same into consideration, and having produced before me a copy of said will and of the probate thereof, duly authenticated according to the laws of said State of Maine, where the said will had been proved and allowed, and having also produced satisfactory evidence that there is estate within the said county of Suffolk whereon the said will may operate, I do decree that the copy of said will, with the copy of the probate thereof, be filed and recorded in the probate office, in said county of Suffolk, pursuant to the statute in that case made and provided, and that letters testamentary thereon be granted to the said Henry Tallman, he giving bond according to law for the faithful discharge of said trust.

WILLARD PHILLIPS,
Judge of Probate.

A true copy.
Attest: ELIJAH GEORGE, *Register.*

Jan. 6, 1888.

22 EXHIBIT B.

To the honorable judge of probate for the county of Suffolk, in the Commonwealth of Massachusetts:

Respectfully shews Charles McIntier, of Boston, in said county, broker, that there is occasion for a guardian to be appointed for Peleg Tallman, of Bath, in the county of Lincoln, in the State of Maine, a minor under the age of fourteen years, viz., seven years, and a son of Henry Tallman, of said Bath, whose assent is hereinafter given; that your petitioner has been requested by the father to petition for letters of guardianship on said minor and is ready to give bond with sufficient sureties for the faithful discharge of said trust.

Wherefore he prays that guardianship of said minor may be granted to him agreeably to law in such cases made and provided.

Dated at Boston this sixth day of October, in the year 1843.

CHARLES McINTIER.

I assent to the above, and request that the petition may be granted as prayed for.

HENRY TALLMAN.

SUFFOLK, *ss:*

At a probate court held at Boston, in said county, on Monday, the ninth day of October, in the year 1843.

The foregoing petition being duly considered, it is therefore decreed by the court here that guardianship of the said minor be granted to the said Charles McIntier, he giving bond according to law for the faithful discharge of that trust.

WILLARD PHILLIPS,
Judge of Probate.

A true copy.
Attest: ELIJAH GEORGE, *Register.*

23 EXHIBIT C.

To the Honorable Willard Phillips, Esquire, judge of the court of probate for the county of Suffolk:

Pursuant to the warrant to us directed from your honor, we, the subscribers, the committee therein named, having been first sworn, have made the following appraisement of the estate and effects comprised in the inventory of the real estate, goods, chattels, rights, and credits of Peleg Tallman, of Bath, in the county of Lincoln and State of Maine, a minor, as made by the guardian, Charles McIntier:

Amount of real estate, $11,500.00; amount of personal estate, 00.00. The particulars of which are hereto annexed: A lot of land on Pleasant Street court, measuring on said court about 147 feet, westerly on Church street about 50 feet, southerly on land of Mrs. Blake about 147 feet, easterly on land of James N. Howe and Deborah Parker about 50 feet, with two brick houses and one wooden house on the same, the rest of the lot being unimproved, the said minor being entitled to the same after the death of his father, who has a life estate therein.

Minor's interest valued at $1,500.00.

LEMUEL P. EATON.
A. G. BAXTER.
H. MORRISON.

SUFFOLK, *ss:*

At a probate court held at Boston, in said county, on Monday, the thirteenth day of November, in the year one thousand eight hundred and forty-three.

Charles McIntier, the said guardian, exhibits the foregoing and makes oath that it contains a true and perfect inventory of all the estate of said minor that has come to his hands or knowledge, and if anything further shall hereafter appear he will render a just and true account thereof into the probate office. It is ordered by the judge of said court that the same be accepted and filed, and that this decree, together with the said warrant, be recorded.

WILLARD PHILLIPS,
Judge of Probate.

24 [L. S.] COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

The Honorable Willard Phillips, Esquire, judge of the court of probate in and for the county of Suffolk aforesaid, to Lemuel P. Eaton, Albert G. Baxter, and Henry Morrison, all of the city of Boston, Greeting:

Your are hereby appointed and empowered as three suitable persons to appraise all the real estate, goods and chattels, rights and credits of Peleg Tallman, of Bath, in the county of Lincoln and State of Maine, minor, comprised in the inventory, according to your best skill and judgment, as soon as may be, in dollars and cents, ac-

cording to the present value thereof, being first sworn to the faithful discharge of that trust.

And when you shall have completed the said appraisement as aforesaid you are to deliver the same, together with this warrant, with your doings thereon, sealed up, to Charles McIntier, his guardian, who is hereby accordingly directed so to return and exhibit the same on oath into the probate office of the said county of Suffolk within three months from the time of taking upon himself that trust.

Witness the said Willard Phillips, Esquire, judge as aforesaid, under his hand and seal official, this ninth day of October, in the year one thousand eight hundred and forty-three.

WILLARD PHILLIPS,
Judge of Probate.

Countersigned: H. M. WILLIS, *Register.*

SUFFOLK, *ss:*

BOSTON, *Oct. 25th, in the Year* 1843.

Then the above-named Lemuel P. Eaton, Albert G. Baxter, and Henry Morrison personally appeared and made oath that they would faithfully and impartially discharge the trust reposed in them by the foregoing warrant.

Before me—

E. H. DULY,
Justice of the Peace.

A true copy.
Attest: ELIJAH GEORGE, *Register.*

25 EXHIBIT D.

To the Honorable Willard Phillips, Esquire, judge of the court of probate in and for the county of Suffolk, in the Commonwealth of Massachusetts:

The petition of Charles McIntier, of Boston, in the county of Suffolk, guardian of Peleg Tallman, of Bath, in the county of Lincoln and State of Maine, a minor—

Respectfully represents that the said minor is seized, subject to the life estate therein of his father, Henry Tallman, of certain real estate situated in Boston aforesaid and consisting of a lot of land lying on Pleasant Street court, measuring on said court about one hundred and forty-seven feet, westerly on Church street about fifty feet, southerly on land now or late of Mrs. Blake about one hundred and forty-seven feet, easterly on land now or late of J. N. Howe and Deborah Parker about fifty feet, with two brick houses and one wooden house on the same; that said houses are decaying and going out of repair, and are depreciating and will continue to depreciate in value on that account; the residue of the lot is unimproved land, and accordingly—

That it will be for the benefit of said minor that his said real estate be disposed of and the proceeds thereof be put out on interest or invested in some productive stock.

Wherefore the said guardian prays that he may be authorized and empowered to sell the same agreeably to the law in such case made and provided.

CHARLES McINTIER, *Guardian.*

SUFFOLK, *ss:*

At a court of probate holden at Boston, in and for said county of Suffolk, on Monday, the twenty-seventh day of November, in the year 1843, upon the petition aforesaid, this day preferred by the above-named Charles McIntier, ordered, that the said petitioner give notice to the next of kin, and to all persons interested in the estate of said ward or in the subject-matter of said petition, to appear at a court of probate to be holden at said Boston, on Monday, the twenty-fifth day of December next, by advertisement of the foregoing petition, with this order thereon, three weeks successively in the newspaper — the Boston Courier, printed at said Boston, the last publication to be three days at least before the said twenty-fifth day of December, when and where they may be heard concerning the same; and make return of his doings herein unto said court.

WILLARD PHILLIPS,
Judge of Probate.

I have given notice to all persons interested in the foregoing petition, as above directed, by advertisement thereof, with the order thereon, three weeks successively in the Boston Courier in the manner and within the time above prescribed.

CHARLES McINTIER.

26 SUFFOLK, *ss:*

At a probate court held at Boston, in said county, on Monday, the twenty-fifth day of December, in the year 1843, personally appeared the said Charles McIntier and made oath to the truth of the above return by him subscribed.

Before me—

WILLARD PHILLIPS,
Judge of Probate.

A true copy.
Attest:

ELIJAH GEORGE, *Register.*

EXHIBIT E.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

At a probate court held at Boston, in and for said county of Suffolk, on Monday, the twenty-fifth day of December, in the year 1843.

Upon the petition of Charles McIntier, guardian of Peleg Tallman, of Bath, in the county of Lincoln and State of Maine, minor, representing that the said minor is seized, subject to the life estate therein of his father, Henry Tallman, of certain real estate hereinafter described, and that, for the reasons therein set forth, it will be for the benefit of said minor that his said interest therein should

be sold and the proceeds thereof put out on interest or invested in some productive stock, and praying that he may be duly licensed to sell the same—

It appearing to the court that the next of kin and all persons interested in the estate of said minor or in the subject-matter of said petition have been duly notified thereof, and that it will be for the benefit of said minor that his said interest in said real estate, consisting of a certain lot of land lying on Pleasant Street court, in said Boston, with the buildings thereon, as particularly set forth in said petition, should be sold and the proceeds thereof be put out on interest or invested in some productive stock—

License is hereby granted to said Charles McIntier to sell the said minor's real estate above described, in order that the proceeds thereof may be put out or invested as aforesaid.

And the said Charles McIntier is ordered to give public notice of the time and place of such sale by publishing such notice three weeks successively in the newspaper called the Boston Courier, printed at said Boston, first giving bond and taking the oath by law required, and in all things relating to said sale to conform to the rules of law.

WILLARD PHILLIPS,
Judge of Probate.

27 Examined by H. M. Willis, reg'r.

REGISTRY OF PROBATE, BOSTON, *Jan.* 3, 1888.

A true copy.
Attest: ELIJAH GEORGE, *Register.*

EXHIBIT F.

Know all men by these presents that we, Charles McIntier, broker, as principal, and Thomas Darling, trader, as surety, both of Boston, in the county of Suffolk, and all within the Commonwealth of Massachusetts, are holden and stand firmly bound and obliged unto Willard Phillips, Esquire, judge of the probate court in and for the county of Suffolk, in the full and just sum of three thousand dollars, to be paid to the said Willard Phillips and his successors in said office; to the true payment whereof we do bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals. Dated this twenty-fifth day of December, in the year one thousand eight hundred and forty-three.

The condition of this obligation is such that whereas, by the court of probate holden at Boston, within and for the said county of Suffolk, on the said twenty-fifth day of December current, license was granted to the above-bounden Charles McIntier, in his capacity of guardian of Peleg Tallman, of Bath, in the county of Lincoln and State of Maine, a minor, to sell the real estate of said ward in the petition for said license described and for the reasons and purposes therein set forth:

Now, therefore, if the said Charles McIntier shall sell the [illegible] in the manner prescribed for sales of real estate by executors and administrators, and shall account for and dispose of the proceeds of the sale thereof in the manner provided by law, then this obligation to be void; otherwise to remain in full force.

CHAS. McINTIER. [L. S.]
THOS. DARLING. [L. S.]

Signed, sealed, and delivered in presence of—
PAUL ADAMS.

28 SUFFOLK, *ss:*

At a probate court held at Boston, in said county, on Monday, the twenty-fifth day of December, in the year 1843.

I have examined and do approve the foregoing bond, and order that the same be recorded in the probate office.

WILLARD PHILLIPS,
Judge of Probate.

I, Charles McIntier, do solemnly swear that in disposing of the real estate belonging to Peleg Tallman, of Bath, in the county of Lincoln and State of Maine, minor, under my guardianship I will use my best judgment in fixing on the time and place of sale, and that I will exert my utmost endeavors to dispose of the same in such manner as will be most for the advantage of all persons interested therein, so help me God.

CHARLES McINTIER.

SUFFOLK, *ss:*

JAN'Y 10, *in the Year* 1844.

The above-named Charles McIntier took and subscribed the foregoing oath this day.

Before me—

H. M. WILLIS,
Justice of the Peace.

A true copy.
Attest: ELIJAH GEORGE, *Register.*

EXHIBIT G.

To the Honorable Edward G. Loring, judge of probate for the county of Suffolk:

Respectfully represents Charles McIntier, of Boston, in said county, that on the twentieth day of March, in the year of our Lord one thousand eight hundred — forty-four, he, as guardian of Peleg Tallman, a minor, sold under a license from said court the real estate of said minor described in the accompanying affidavit, and that inadvertently he omitted to file in said court his affidavit of notice of said sale pursuant to law.

He therefore prays that the accompanying affidavit may now be filed and recorded according to the provisions of chapter 393 of the statutes of the year 1853.

Dated at Boston this thirteenth day of April, A. D. 1857.

CHAS. McINTIER.

29 SUFFOLK, *ss:*

In Probate Court, Ap'l 13, 1857.

Upon the foregoing petition it is ordered that the same be granted.

EDW. G. LORING,
Judge of Probate.

I, Charles McIntier, of Boston, in the county of Suffolk and Commonwealth of Massachusetts, formerly guardian of Peleg Tallman, of Bath, in the county of Lincoln and State of Maine, a minor, on oath depose and say that prior to making sale of the real estate of said minor, under and by virtue of license therefor from the probate court for said county, dated the twenty-fifth day of December, in the year eighteen hundred and forty-three, I caused notice of such sale to be published in the Boston Courier according to the order of said court contained in said license, of which said notice the following is a copy:

Guardian's Sale.

By virtue of a license from probate court for the county of Suffolk will be sold at public auction, on Wednesday, the 20th day of March, at 4 o'clock p. m., the interest of Peleg Tallman, of Bath, in the county of Lincoln and State of Maine, a minor, in a lot of land lying on Pleasant Street court, in said Boston, measuring on said court about 147 feet, westerly on Church street about 50 feet, southerly on land now or late of Mrs. Blake about 147 feet, easterly on land now or late of J. N. Howe and Deborah Parker about 50 feet, with two brick houses and a wooden house on the same, the said minor being entitled to the same subject to the life estate of his father, Henry Tallman, therein.

CHARLES McINTIER, *Guardian.*

Feb'y 27–2–a–w. 3w.

CHAS. McINTIER.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

BOSTON, *April* 13, 1857.

Then the above-named Charles McIntier made oath to the truth of the above affidavit.

Before me—

J. P. HEALY,
Justice of the Peace.

REGISTRY OF PROBATE, BOSTON, *Jan.* 3, 1888.

A true copy.
Attest: ELIJAH GEORGE, *Register.*

30 EXHIBIT H.

McIntier, guard., to Tallman.

Libro 530, folio 286.

To all persons to whom these presents shall come:

I, Charles McIntier of Boston in the county of Suffolk in the State of Massachusetts, guardian of Peleg Tallman of Bath, in the county of Lincoln and State of Maine, a minor, send greeting: Whereas by an order of the probate court begun and held at Boston within the county of Suffolk on the twenty-fifth day of December last past I the said Charles McIntier was licensed and empowered to sell and pass deeds to convey the real estate of the said Peleg Tallman hereinafter described. And whereas I, the said Charles McIntier, having given public notice of the intended sale by printing a notification thereof three weeks successively in the newspaper called the Boston Courier printed in Boston aforesaid, agreeably to the order and direction of said court and having given the bond and taken the oath by law, in such cases required previous to fixing upon the time and place of said sale, did on the twentieth day of March instant pursuant to the license and notice aforesaid, sell by public auction on the premises the real estate of the said Peleg Tallman hereinafter described to Henry Tallman of said Bath, for the sum of fourteen hundred dollars, he being the highest bidder therefor. Now, therefore, know ye that I the said Charles McIntier by virtue of the power and authority in me vested as aforesaid, and in consideration of the aforesaid sum of fourteen hundred dollars to me paid by the said Henry Tallman, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said Henry Tallman, his heirs and assigns a lot of land lying on Pleasant Street court in said Boston measuring on said court about one hundred and forty-seven feet; westerly on Church street about fifty feet; southerly on land now or late of Mrs. Blake about one hundred and forty-seven feet; easterly on land now or late of I. N. Howe and Deborah Parker about fifty feet, with two brick houses and one wooden house on the same. The same being subject to the life estate of the said Henry Tallman the father of said Peleg therein and to any incumbrances imposed or created by the will of the late Peleg Tallman thereon. To have and to hold the aforegranted premises to the said Henry Tallman, his heirs and assigns to their use and behoof forever. And I the said Charles McIntier for myself and my heirs, executors and administrators do hereby covenant with the said Henry Tallman, his heirs and assigns that in pursuance of the license aforesaid I took the oath and gave the bond by law required and gave public notice of said sale as above set forth.

In witness whereof I, the said Charles McIntier, have hereunto set my hand and seal this twenty-fifth day of March, in the year of our Lord one thousand eight hundred and forty-four.

CHARLES McINTIER. [L. S.]

31 Signed, sealed and delivered in presence of *us*—

RICH'D ROBINS.

SUFFOLK, *ss*:

MARCH 25TH, 1844.

Then personally appeared the above-named Charles McIntier and acknowledged the above instrument to be his free act and deed before me—

RICH'D ROBINS,
Justice of the Peace.

Oct. 7, 1844, at 55 minutes past 12 o'clock p. m., received, entered, and examined.

P'r HENRY ALLINE, *Reg.*

A true copy from the records of deeds for the county of Suffolk, Libro 530, folio 286.

Attest: THOS. F. TEMPLE, *Reg.*

EXHIBIT 1.

Tallman to McIntier, g'd'n.

Libro 520, folio 171.

Know all men by these presents: That I, Henry Tallman of Bath, in the county of Lincoln and State of Maine, gentleman, in *in* consideration of thirteen hundred dollars to me paid by Charles McIntier of Boston in the county of Suffolk and Commonwealth of Massachusetts, guardian of Peleg Tallman, of said Bath, a minor, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Charles McIntier, his heirs and assigns as guardian aforesaid, a certain piece or parcel of land lying on Pleasant Street court, in said Boston, bounded and described as follows, viz: Northerly on said Pleasant Street court there measuring thirty-eight feet or thereabouts; southerly on land now or late of Mrs. Blake thirty-eight feet or thereabouts, said lot being fifty feet or thereabouts deep from said court and having two brick dwelling-houses thereon, No. 15 and 16 on said court; or however otherwise bounded and described; -aning and intending hereby to convey the two lots of land with the dwelling-houses thereon, one being now in the occupation of Henry B. Hodgdon and the other in that of Andrew Schaeffer. To have and to hold the above-granted premises to the said Charles McIntier as such guardian, his heirs and
32 assigns to their use and behoof forever. And I the said Henry Tallman for myself and my heirs, executors and administrators do covenant with the said McIntier his heirs and assigns that I am lawfully seized in fee simple of the aforegranted premises; that they are free from all incumbrances that I have good right to sell and convey the same to the said McIntier, his heirs and assigns forever as aforesaid; and that I will and my heirs, executors and administrators shall warrant and defend the same to the said McIntier, his heirs and assigns forever against the lawful claims and demands of all persons. Provided nevertheless that if the said Henry Tallman, his heirs, executors or administrators shall

pay unto the said McIntier, his executors, administrators or assigns the sum of thirteen hundred dollars in two years from the date hereof with interest on said sum at the rate of six per centum per annum *per annum* payable annually then this deed as also a promissory note bearing even date with these presents, signed by the said Henry, whereby he promises to pay to the said McIntier or order the said sum and interest at the times aforesaid, shall both be absolutely void to all intents and purposes. And provided also, that until default of the payment of the said sum or interest or other default as herein provided, the mortgagee shall have not right to enter and take possession of the premises.

In witness whereof, I, the said Henry Tallman and Sarah F. wife of the said Henry, in token of her relinquishment of all right and claim to dower in the premises, have hereunto set our hands and seals this twenty-fifth day of March in the year of our Lord eighteen hundred and forty-four.

HENRY TALLMAN. [L. S.]
S. F. TALLMAN. [L. S.]

Signed, sealed, and delivered in presence of—the clause as to insurance being first stricken out—
RICH'D ROBINS.
LYDIA M. FITTS.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

MARCH 25TH, 1844.

Then personally appeared the above-named Henry Tallman and acknowledged the above instrument to be his free act and deed.
Before me—

RICH'D ROBINS,
Justice of the Peace.

April 18, 1844, at 55 minutes past 10 o'clock a. m., received, entered, and examined.

P'r HENRY ALLINE, *Reg.*

A true copy from the records of deeds for the county of Suffolk, Libro 520, folio 171.
Attest: THOS. F. TEMPLE, *Reg.*

33

EXHIBIT J.

Tallman to Knott.

Libro 530, folio 270.

Know all men by these presents: That I, Henry Tallman of Bath in the county of Lincoln, State of Maine, in consideration of twenty-nine hundred dollars, paid by Robert Knott of Boston in the county of Suffolk, State of Massachusetts the receipt whereof is hereby acknowledged do hereby give, grant, bargain, sell and convey unto the said Robert Knott a certain lot of land with the buildings

thereon situate in said Boston and bounded and measuring as follows, viz: Northerly by Pleasant Street court, there measuring about thirty-five feet, to land of said Tallman now occupied by Andrew Schaffer; westerly by said land of said Tallman fifty feet; southerly by land now or late of Mrs. Blake and easterly by land of Mrs. Parker and I. N. Howe, with all the privileges and appurtenances to the same belonging. Being the same premises now occupied by said Knott and intending and meaning hereby to convey all of the premises now occupied by him together with a use in common of said Pleasant Street court. To have and to hold the above-granted premises with the privileges and appurtenances thereto belonging to the said Robert Knott, his heirs and assigns to his use and behoof forever. And I, the said Henry Tallman, for myself and my heirs, executors and administrators do covenant with the said Robert Knott, his heirs and assigns that I am lawfully seized in fee of the aforegranted premises, that they are free from all incumbrances. That I have a good right to sell and convey the same to the said Robert Knott as aforesaid; and that I will and my heirs, executors and administrators shall warrant and defend the same to the said Robert Knott, his heirs and assigns forever against the lawful claims and demands of all persons.

In witness whereof I the said Henry Tallman and Sarah F. Tallman, wife of said Henry in relinquishment of her dower in the premises have hereunto set our hands and seals this fourth day of October in the year of our Lord eighteen hundred and forty-four.

HENRY TALLMAN. [L. S.]
S. F. TALLMAN. [L. S.]

Signed, sealed, and delivered in presence of—
WM. H. WHITMAN.

34 COMMONWEALTH OF MASSACHUSETTS, *Lincoln*, } *ss:*

OCT. 4TH, 1844.

Then personally appeared the above-named Henry Tallman and acknowledged the above instrument to be his free act and deed.
Before me—

IVERS I. AUSTIN,
Justice of the Peace.

Oct. 5th, 1844, at 6 minutes past 2 o'clock p. m., received, entered, and examined.

P'r HENRY ALLINE, *Reg.*

A true copy from the records of deeds for the county of Suffolk, Libro 530, folio 270.
Attest:

THOS. F. TEMPLE, *Reg.*

EXHIBIT K.

To the Honorable E. G. Loring, judge of probate for the county of Suffolk:

Respectfully represents your petitioner, Henry L. Richardson, of Boston, in said county, merchant, that at a court of probate holden within and for said county of Suffolk, on the second of May last past, after due notice was given, your petitioner was appointed guardian of one Peleg Tallman, of Bath, Maine, minor, and son of Henry Tallman and grandson of Peleg Tallman, in the place of one Charles McIntier, of said Boston, and has given bonds for the faithful discharge of said trust; and your petitioner further reprerents that by his attorney, James A. Abbott, he has repeatedly requested said McIntier to render an account to this court of probate of the goods and estate of the said Peleg Tallman and of the management and disposition of the same.

Now, your petitioner prays that the said McIntier may be notified and directed to render his account of the goods and estate of the said Tallman in his possession as guardian, and that the same may be delivered into the hands and possession of your petitioner; and, as in duty bound, will ever pray.

H. L. RICHARDSON.

Boston, Oct. 31st, 1853.

35 SUFFOLK, *ss:*

At a probate court held at Boston, in said county, on Monday, the thirty-first day of October, in the year one thousand eight hundred and fifty-three.

Upon the above application it is ordered that the said Charles McIntier be cited to appear at a probate court to be held at said Boston, on Monday, the fourteenth day of November next, at ten o'clock before noon, then and there to answer thereto and abide the decision of said court thereon.

EDW. G. LORING,
Judge of Probate.

A true copy.
Attest: ELIJAH GEORGE, *Register.*

EXHIBIT L.

Knott to Rechel.

Libro 967, folio 295.

Stamp, $5.00.

Know all men by these presents: That I, Robert Knott of Boston, in consideration of four thousand eight hundred dollars paid by Christian Rechel of Boston, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Christian Rechel, his heirs and assigns forever, all that lot

of land situated in the city of Boston, and bounded as follows, to wit: Northwardly by Berlin street (formerly called Pleasant Street court) thirty-five (35) and $\frac{60}{100}$ feet; westwardly and southwardly by land of Horatio Harris on two (2) lines (50) fifty feet and (33) thirty-three and $\frac{60}{100}$ feet; and eastwardly by land of Charles W. and James C. Munroe and by land of the heirs of Joshua Bennett on (2) two lines (26) twenty-six and $\frac{75}{100}$ feet and (23) twenty-three and $\frac{88}{100}$ feet, containing (1,750) seventeen hundred and fifty square feet more or less, being the premises described in city document No. (41) forty-one 1868 at page (90) as belonging to Robert Knott. The same premises more or less are also described in the deed of Henry Tallman to said Knott, dated October 4th, A. D. 1844, and recorded in Suffolk deeds, Book 530 at page 270; and they are now occupied by Christian Rechel. To have and to hold the above-granted premises with all the privileges and appurtenances to the same belonging to the said Christian Rechel, his heirs and assigns to their own use and behoof forever. And I the said grantor for myself and my heirs, executors and administrators do covenant with the said grantee and his heirs and assigns that I am lawfully seized in fee simple of the aforegranted premises; that they are free from all incumbrances made by me; that I have good right to sell and convey the same to the said grantee and his heirs and assigns forever, Christian Rachel as aforesaid; and that I will and my heirs, executors
36 and administrators shall warrant and defend the same to the said grantee and his heirs and assigns forever against the lawful claims and demands of all persons, except taxes and betterments levied or to be levied by the city of Boston, which are to be paid by said Rachel.

In witness whereof I the said Robert Knott with my wife Izannah Knott in token of her release of all right and title of or to both dower and homestead in the granted premises, have hereunto set our hands and seals this seventeenth day of May, in the year of our Lord eighteen hundred and sixty-nine.

ROBERT KNOTT. [L. S.]
IZANNAH KNOTT. [L. S.]

Signed, sealed, and delivered in presence of—
EDWARD BUCK.
ELIZABETH ROGERS.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk Co.*, } *ss:*

JULY 7, 1869.

Then personally appeared the within-named Robert Knott and acknowledged the foregoing instrument to be his free act and deed.
Before me—

EDWARD BUCK,
Justice of the Peace.

July 9th, 1869, at ten o'clock and thirty-nine minutes a. m., received, entered, and examined.
Attest: JAMES RICE, *Reg.*

A true copy from the records of deeds for the county of Suffolk, Libro 967, folio 295.

Attest: CHAS. W. KIMBALL, *Ass't Reg.*

37 EXHIBIT M.

Know all men by these presents: That I, Robert Knott, of Charlestown in the county of Middlesex and Commonwealth of Massachusetts, in consideration of a deed of release bearing even date herewith, executed to Christian Rechel at my request by the city of Boston, of a certain parcel of land, with the buildings thereon, situated on Tennyson, late Berlin street, in said Boston, and bounded and described as follows, viz: Northwardly by the southerly line of Tennyson street there measuring thirty-five and sixty one hundredths (35.60) feet, eastwardly by land late of the heirs of Joshua Bennett and by land late of Charles W. and James C. Munroe, on three lines twenty-three and thirty-three one hundredths (23.33) feet, twenty-six and seventy-five one hundredths (26.75) feet, and one and twenty-five one hundredths (1.25) feet; southwardly by land late of Horatio Harris twenty and forty one hundredths (20.40) feet; westwardly by the same one and five one hundredths (1.05) feet; again southwardly by the same thirteen and twenty one hundredths (13.20) feet; and westwardly by other land late of said Harris fifty (50) feet, containing one thousand seven hundred and seventy-three (1,773) square feet more or less.

Now I, the said Robert Knott, for the above-named consideration, the receipt whereof is hereby acknowledged, do hereby release, acquit and forever discharge said city of Boston of and from all claims and demands whatever, for damage, costs, expense and compensation, for or on account of or in any way growing out of taking the following-described parcel of land, with the buildings thereon, under the provisions of the 308th chapter of the statutes of said Commonwealth of the year 1867, by an instrument recorded with Suffolk deeds Liber 938, folio 121. Said last-named parcel of land is situated on said Tennyson street in said Boston, and bounded and described as follows, viz: Northwardly by said Tennyson street there measuring thirty-five and sixty one hundredths (35.60) feet; westwardly and southwardly by land late of Horatio Harris on two lines fifty (50) feet and thirty-three and sixty one hundredths (33.60) feet and eastwardly by land late of Charles W. and James C. Monroe, and by land late of the heirs of Joshua Bennett, on two lines twenty-six and seventy-five one hundredths (26.75) feet and twenty-three and thirty-three one hundredths (23.33) feet, containing seventeen hundred and fifty (1,750) feet more or less; being the same real estate which was taken from me by said city of Boston under the provisions of the 308th chapter of the statutes of said Commonwealth, of the year 1867, by said instrument recorded as aforesaid.

And I, the said Robert Knott, do hereby covenant with the said city of Boston that I will, and my heirs, executors and administrators, shall indemnify and save harmless said city of Boston from any and all lawful claims and demands, for or on account of said

damages, of or by any person or persons having or claiming any interest or estate in said last-described real estate at the time of said taking.

38 Witness my hand and seal this fourteenth day of March, eighteen hundred and seventy.

ROBERT KNOTT. [L. S.]

In presence of—
C. F. KITTREDGE. (Stamp.)

Approved:

C. F. KITTREDGE, *A. C. L.*

This cause was thereupon set down for hearing and fully heard by the court upon said agreed statement of the case, and was thence continued under advisement to this present term, when the opinion of the court is announced ordering judgment for defendant.

It is thereupon considered by the court, to wit, January 26, A. D. 1889, that the said William A. Sweet, Maria H. Sweet, Frank G. Tallman, and Peleg H. Tallman, plaintiffs, take nothing by their said writ, and that the said Christian Rechel, defendant, recover of the said plaintiffs his costs of suit, taxed at twenty-six dollars and three cents.

A true record.
Attest: JOHN G. STETSON, *Clerk.*

39 The following is the opinion of the court, in accordance with which judgment was entered in favor of the defendant:

Circuit Court of the United States, District of Massachusetts.

WILLIAM A. SWEET *et al.*
v.
CHRISTIAN RECHEL. } No. 2543, Law Docket.

Opinion of the Court.

(January 26, 1889.)

COLT, *J.:*

This is a writ of entry brought to determine the title to certain real estate situated in the city of Boston. The case was heard upon an agreed statement of facts. The defendant claims to derive title from Peleg Tallman, Jr., the father of the plaintiffs, under a guardian's deed executed in 1844, and he also claims title under a deed from the city of Boston, dated March 14, 1870. The plaintiffs contend that no title was conveyed by either of these instruments, and that the title to the property is in them as heirs-at-law of Peleg Tallman, Jr. As the defendant seems to rely more upon the deed from the city of Boston, let us first consider the grounds upon which its validity is attacked.

On June 1, 1867, the legislature of Massachusetts passed an act entitled, "An act to enable the city of Boston to abate a nuisance

existing therein, and for the preservation of the public health in said city."

This act provided that the city might purchase or otherwise take the lands and buildings within a certain district known as the
40 Church Street district, and that the title of all land so taken should vest in the city of Boston. It further provided that a party whose land was taken might agree with the city upon the damage done, and that he should then be paid the amount by the city. It further provided that any person entitled to any estate in the land so taken might within one year bring a bill in equity, setting forth the claims for damages against the city of Boston or the Boston Water Power Company, or any other corporation or person by reason of any wrongful act or omission in causing diminution in the value of the land at the time of said taking, and praying an assessment of damages against such parties.

The land in controversy was taken under this act, and subsequently on March 14, 1870, the city for a valuable consideration deeded the land to the defendant. The main contention of the plaintiffs is that no title to the land passed under this act. They do not deny the constitutionality of the act because that question has already been settled by the supreme court of the State in Dingley *v.* City of Boston, (100 Mass., 544,) but they say no title to the property passed until compensation was given, and that as nothing was ever paid by the city to the real owners, the city never acquired any title, and that consequently nothing was conveyed by the deed of the city to the defendant.

In determining the question now raised it must be borne in mind that the object of this act was the abatement of a nuisance. The land was not taken under the right of eminent domain; but under the police power of the State. This case therefore is not parallel to that of Kennedy *v.* Indianapolis, 103 U. S., 599, upon which the plaintiffs largely rely. In Bancroft *v.* City of Cambridge, 126 Mass., 438, the court in the construction of a similar act for the abatement of nuisance use the following language: "It was not passed to delegate the right of eminent domain, but under the police power of the Commonwealth. Laws passed in the legitimate exercise
41 of this power are not obnoxious to constitutional provisions, merely because they do not provide compensation to the individual who is inconvenienced by them. He is presumed to be rewarded by the common benefits secured. Instances of its exercise are found in all quarantine and health regulations, and in all laws for the abatement of existing and prevention of threatened nuisances. It has been many times recognized and applied in the decisions of this court."

But as already stated this act has been construed by the supreme judicial court of Massachusetts in Dingley *v.* City of Boston, and the court there held not only that the act was constitutional but that land taken under the act vested the fee in the city as absolute owners. To be sure in that case the question of compensation was not directly raised or passed upon, but it logically follows from the conclusions of the court in that case that the plaintiffs have no

right to maintain this action. If the act was constitutional and a fee vested in the city under its provisions, then clearly by that decision no remedy was left to the owners except the assessment of damages as provided in the act.

The construction of a State statute by the highest court of the State is conclusive upon the Federal courts. For these reasons I am of opinion that the city of Boston derived title to the lands in controversy under the act of 1867, and that by the deed from the city the defendant subsequently became the owner of the property. The conclusion here reached renders it unnecessary to enter upon any inquiry as to the validity of the guardian's deed. Judgment should be entered for the defendant and it is so ordered.

Judgment for defendant.

42 The following is the assignment of errors filed by the plaintiffs to be transmitted with the record:

Circuit Court of the United States, District of Massachusetts.

WILLIAM A. SWEET *et al.*, Plaintiffs,
v.
CHRISTIAN RECHEL, Defendant. } 2543, Law Docket.

Plaintiffs' Assignment of Errors.

This is an action to recover possession of certain real estate in the city of Boston, district of Massachusetts, claimed by the plaintiffs and held by the defendant in adverse possession.

The pleadings in the case and the agreed statement of facts filed therein fully show the nature of the plaintiffs' claim. Upon the agreed statement of facts the circuit court ruled that the plaintiffs could not recover; which ruling the plaintiffs claim to be erroneous.

43 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss*:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause entitled William A. Sweet *et al.*, plaintiffs, *v.* Christian Rechel, defendant, 2543, law docket, lately determined in said circuit court, and of all proceedings therein, and of the opinion of the court and of the assignment of errors filed therein.

Seal of the Circuit Court, Massachusetts.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this first day of April, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

JOHN G. STETSON, *Clerk.*

44 Know all men by these presents that we, Frank G. Tallman, of Beaver Falls, Pennsylvania, formerly of Syracuse, Onondaga county, New York, as principal, and George H. Wightman, of Boston, and S. Robert Reading, of Newton, both within the district of Massachusetts, as sureties, are held and firmly bound unto Christian Rechel, of Boston, district of Massachusetts, in the full and just sum of three hundred dollars, to be paid to the said Christian Rechel, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the thirty-first day of January, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between William A. Sweet and Maria H. Sweet, his wife, and Frank G. Tallman and Peleg H. Tallman, plaintiffs, and Christian Rechel, defendant, judgment was rendered against the said plaintiffs, and the said plaintiffs having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiffs shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

F. G. TALLMAN. [L. S.]
GEO. H. WIGHTMAN. [L. S.]
S. ROB'T READING. [L. S.]

Signed, sealed, and delivered in presence of—
MARK WISNER, JR.
HARRY CROWL.

Approved:
THOS. L. NELSON, *D. J.*

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond; which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

45 The United States of America to Christian Rechel, of Boston, in the district of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the eighth day of April next, pursuant to a writ of error filed in

the clerk's office of the circuit court of the United States within and for the district of Massachusetts, dated the twenty-fourth day of January, A. D. 1891, and made returnable at the October term of the Supreme Court of the United States, A. D. 1891, wherein William A. Sweet and Maria H. Sweet, his wife, and Frank G. Tallman and Peleg H. Tallman are plaintiffs in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas L. Nelson, district judge, sitting in the circuit court of the United States for the district of Massachusetts, this eleventh day of March, in the year of our Lord one thousand eight hundred and ninety-one.

THOS. L. NELSON,
U. S. District Judge.

46 [Endorsed:] 1096. United States marshal's office, room 101, P. O. building, Boston, Mass., Mar. 12, 1891. James E. Leach, 40 Water St.

UNITED STATES OF AMERICA, *Massachusetts District*, } ss:

BOSTON, *March 12th*, 1890.

Pursuant hereunto I have this day notified the within-named Christian Rechel to appear at court, as within directed, by giving to him in hand, at Boston, a true and attested copy of the within precept.

W. S. HOYT,
Deputy U. S. Marshal.

Fees.

Service	2 00
Copy	1 00
Tr	12
	$3 12

Endorsed on cover: Case No. 14,568. Massachusetts C. C. U. S. No. 122. William A. Sweet and Maria H. Sweet, his wife, and Frank G. Tallman and Peleg H. Tallman, plaintiffs in error, *vs.* Christian Rechel. Filed April 6, 1891.

Brief for Plaintiffs in Error.

THE SUPREME COURT OF THE UNITED STATES.

No. 122.

WILLIAM A. SWEET AND MARIA H. SWEET, HIS WIFE, AND FRANK G. TALLMAN AND PELEG H. TALLMAN,

—Plaintiffs in Error.

vs.

CHRISTIAN RECHEL.

ON WRIT OF ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

THOMAS A. JENCKES,
Counsel for Plaintiffs in Error.

Brief for Plaintiffs in Error.

THE SUPREME COURT OF THE UNITED STATES.

No. 122.

WILLIAM A. SWEET AND MARIA H. SWEET, HIS WIFE, AND FRANK G. TALLMAN AND PELEG H. TALLMAN,

—Plaintiffs in Error.

VS.

CHRISTIAN RECHEL.

ON WRIT OF ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

THOMAS A. JENCKES,

Counsel for Plaintiffs in Error.

The Supreme Court of the United States.

OCTOBER TERM, A. D., 1894.

WILLIAM H. SWEET AND MARIA H. SWEET, HIS WIFE, AND FRANK G. TALLMAN AND PELEG H. TALLMAN, *Plaintiffs in Error*,

vs.

CHRISTIAN RECHEL.

No. 122.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

The plaintiffs in error in this case bring their writ of entry to recover the possession of certain real estate situated on Tennyson street in the City of Boston, FRANK G. TALLMAN and PELEG H. TALLMAN, are the children and heirs-at-law of PELEG TALLMAN, JR., who was the grandson of PELEG TALLMAN, SR. The latter by his will devised the real estate in question to his son, HENRY TALLMAN for his life, and to his grandson PELEG TALLMAN, JR., remainder in fee. (Record p. 3, Exhibit A, p. 13.) By the death of PELEG TALLMAN, JR., on April 15, 1863, and by the death of HENRY TALLMAN on May 4, 1885, the plaintiffs in error become entitled to the possession thereof, under the will of PELEG TALLMAN, SR., unless they have been divested thereof by the proceedings of condemnation under the act of June 1st, 1867. (Record pp. 6 and 7.) This was the point upon which the lower court based its judgment, (Record pp. 34-36) and the sole question of error presented to this court is, whether the lower court erred in holding that the plaintiffs in error were deprived absolutely of their title to this property, by virtue of the taking of this land by the City of Boston, under the act of June 1, 1867, no compensation therefor having ever been paid to the plaintiffs in error, the owners in fee of the land.

They claim that they have not been divested of their title to the premises under the proceedings of that act; and that, at the time of the death of the life tenant, HENRY TALLMAN, on May 4, 1885, they became entitled to the possession of the same, and hence have brought this suit.

The plaintiffs in error maintain not that the act in question which authorized the taking of their property was unconstitutional, (Dingley vs. Boston, 100 Mass. 544) but that their individual property having been appropriated to public uses, they should receive a reasonable compensation therefor, (Constitution of Massachusetts Pt. I, Art. X) before their title is divested; in other words that compensation should be proved to have actually been made, or no title passes. (See cases cited infra). It is admitted that no compensation was made to the true owners, the plaintiffs in error (Record p, 12) hence no title passed to the City of Boston, by the attempted taking under the act.

On the other hand the defendant maintains that the land in controversy was taken under this act, and subsequently on March 14, 1870, the city for a valuable consideration deeded the land to him, and it is upon that deed that he now relies. He urges that the purpose and object of the act being expressed to be for the abatement of a present nuisance, and for the promotion of the health of the city, the land in question was taken under the so-called police power of the legislature, and consequently that the property of an individual, might be appropriated, without compensation to the owner, regardless of this other provision of the constitution, and regardless of the uniform construction placed upon that provision by the courts, that compensation must actually be paid before title vests, or the individual is not divested of his title.

It becomes necessary, therefore, to determine whether or not the act in question comes under the police power of the legislature, and whether the highest court of Massachusetts has determined such to be the character of this act.

The act in question is as follows:—

MASSACHUSETTS' SPECIAL LAWS.

12. 1866-70.

ACTS AND RESOLVES. CHAPTER 308. (1866, 229.)

AN ACT to enable the city of Boston to abate a nuisance existing therein, and for the preservation of the public health in said city.

Be it enacted, etc., as follows:—

SECTION 1. The city of Boston may purchase or otherwise take the lands or any of them in said city, with the buildings, and other fixtures thereon situated, and lying within the district bounded on the northwest by the north-westlerly line of Columbus avenue, extended to Church street; on the north by the line of the southerly side of the passenger station of the Boston & Providence Railroad Corporation, and the same extended to the westerly line of Church street; on the east by Pleasant street; on the south-east and south by

Tremont street, and the Boston & Worcester Railroad, and on the west by Ferdinand street. Said city shall within sixty days from the time they shall take any of said lands, file in the office of the registry of deeds, for the county of Suffolk, a description of the lands so taken, as certain as is required in a common conveyance of lands; and a statement that the same are taken pursuant to the provisions of this act, which said description and statement shall be signed by the mayor of said city; and the title to all land so taken shall vest in the city of Boston; and if any party whose land so taken shall agree with the said city upon the damage done to him by the said taking, the same shall be paid to him by the said city forthwith. And it shall be the duty of the city of Boston, forthwith to raise the grade of said territory so taken or purchased, laying out and filling up the same with good materials, with reference to a complete drainage thereof, so as to abate the present nuisance, and to preserve the health of the city, and in no wise to affect injuriously the lands of the Commonwealth or its grantees in the back bay, or the system of drainage therein.

SEC. 2. Any person entitled to any estate in any part of the land so taken, may at any time within one year from the time when the same shall be taken, as well in his own behalf, as in behalf of all other persons having estates in the land so taken, file a bill in equity in the supreme judicial court in the county of Suffolk, setting forth the taking of the complainant's land and the condition of the same in respect to its capacity for drainage, and whether the complainant claims any and what damages against the city of Boston, or the Boston Water Power Company, or any other corporation or person by reason of any and what wrongful act or omission, by their causing a diminution in the value of his land at the time of said taking, and praying an assessment of damages against such parties. And upon the filing of such a bill, the said court shall cause notice of the pendency of said bill to be given to the parties named therein as defendants, according to the cause of courts of equity, and also public notice thereof, to all persons in whose behalf such bill shall be filed, to appear and become parties thereto, if they shall think fit to do so. Said court shall prescribe how such public notice shall be given, and what length of time shall be allowed for appearing and becoming a party to such suit. Any party failing so to appear and become a party within the time prescribed by the court, shall be forever barred from recovering any damages on account of such taking. Each person so appearing and becoming a party shall file a written description of the land in which he claims an estate, together with a plan thereof, so as clearly to distinguish the same from all other lands, and shall also declare what estate he claims therein. If he claims that the value of said lands at time of taking the same was lessened by any unlawful act or ommission of the city of Boston, or the Boston Water Power Company or any other corporation or person, so that the value of the land in its condition when taken would not be a just compensation for all the estates and rights of the

party in, and in reference to the same, such party shall also state what such injury is, and how, and by whom the same has been, or is caused, and what right or title of the party is violated, and what amount of damages in gross is claimed by him as compensation therefor from each of the parties defendant.

SEC. 3. Upon the expiration of the time allowed for appearance to the said bill, the said court shall appoint three commissioners who shall receive such compensation as the said court shall fix to be paid by the city of Boston.

SEC. 4. It shall be the duty of the said commissioners after due notice, to hear each of the said parties including the said city of Boston, and the said Water Power Company, and other parties named as defendants, and to assess the present value of each parcel of the said land claimed by any party so appearing, with its capacity for drainage in its present condition; and the amount, in gross, if any, of damages done to such parcel of land by reason of any unlawful act or omission of the city of Boston, or the Water Power Company, or any other party defendant, affecting its value at the time of said taking.

SEC. 5. Said commissioners or the major part of them shall make report to the said court of their doings, and when requested by any party, of the evidence touching any exception intended to be taken by him.

SEC. 6. Any party aggrieved may either except to the report of the said commissioners, and have the exception heard and determined by the said court according to its course as a court of equity, or may apply to the said court to have proper issues framed and tried by a jury, and proceeded in as in other causes of issue ordered by the said court, and on trial of any such issue, the report of the commissioners respecting its subject matter shall be *prima facie* evidence of what is therein stated.

SEC. 7. When it shall be finally determined what amount of damages any party is entitled to recover against the city of Boston, or the Boston Water Power Company, or any other party defendant, a separate decree shall be entered accordingly and execution therefor shall be issued, without regard to the pendency of the claims of any other party or parties, or of other claims of such complainant.

SEC. 8. If any party shall elect a jury, he shall recover his legal costs, if the award of the commissioners shall be altered in his favor, otherwise he shall be liable for the legal costs of the other party or parties.

SEC. 9. Nothing in this act shall be construed as exempting the city of Boston from any obligation it would otherwise be under, to make compensation to the owners of lands abutting on, or near to the territory described in the first section of this act for any injury it may do to such lands in any acts of raising, filling, or draining said territory, or any part thereof.

SEC. 10. If any party shall allege that the value of his land at the time of the said taking had been diminished by any act or omis-

sion of the Commonwealth, or its agents, or officers, for which diminution the Commonwealth ought to make him compensation, he shall make the allegations relating thereto in a separate article of the bill, in a nature of a petition of right against the Commonwealth, and the court shall cause notice thereof to be served upon the attorney-general. And the attorney-general shall appear and may make a separate answer thereto; and the commissioners appointed by the court to assess damages under this act, are hereby empowered to make a separate report of the damages, if any, caused to any party by any act or omission for which the Commonwealth is responsible, and shall at the request of the attorney-general, report the evidence, together with the grounds of their opinion, why the Commonwealth ought to pay the same. And it shall be the duty of the supreme judicial court to instruct the said commissioners on any matter of law involved in their decision, at the request of any party, or of the commissioners, and the proceedings shall be conformed as nearly as possible to those in suits in equity. And the final report of the commissioners on the subject of the claims upon the Commonwealth shall be filed in court in the cause, and a duplicate thereof, transmitted to his excellency, the governor. And if in the opinion of the court it is reasonable that the Commonwealth bear any part of the costs or expenses, the same shall be certified with the said report.

SEC. 11. Said court may make all orders and decrees necessary to carry into full effect the intent of this act, and may at its discretion, at any stage of the proceedings, order a party to give security for the payment of damages or costs.

SEC. 12. All legal costs which shall accrue in proceedings under this act not otherwise provided for shall be paid as the said court shall order.

SEC. 13. This act shall take effect upon its passage.

Approved June 1, 1867.

Before doing so it should be noted, that the question raised in this case, is one of title to the land, not of remedy for recovery of damages either in the mode pointed out by the statute or other form of action. If it were a suit for compensation for the land taken, it is admitted that the mode pointed out by the statute is exclusive. In a question of title however, the constitutional provision requiring compensation must be complied with, if at all, before the owner is deprived of title.

Again, it should be noted that if the act is upheld, in the manner determined by the circuit court, it, in effect, vests the title of an individual in another without compensation, and that too, in the very one whose acts had created the nuisance, or in other words, it takes one man's land, and gives it to another, without compensation to the former.

Again, it should be noted, that the act in question, does not regulate or restrain the owner, in the use of his property, but absolutely deprives him of it. The owner himself was not at the time of the taking, using the land, either to injure the public health, or to injure his neighbor or the public in any other noxious manner. The act does not pretend to be a salutary restraint on such offensive use by him, contrary to the maxim, *Sic utere tuo ut alienum non laedas*. It is, on the contrary *a taking* of private property for public use, that is, the public exigencies require it to be taken, and upon principle it is far more than a police regulation or restraint upon the owner in his use of the property.

1 Dillon on Munic. Corp., Sec. 141, 4th ed., p. 212.

I.

The provisions of this act, namely, that the city shall take the land, that the title to the land taken shall vest in the city, that the owner shall agree with the city upon the damage done to him by the taking, and the payment therefor, that in case the owner and city cannot agree, a mode for ascertaining payment is provided, by suit and appointment of commissioners to assess the damages, and an appeal to a jury, upon proper issues, all show, in the words of Mr. Chief Justice Bigelow in Talbot vs. Hudson, 16 Gray 417, that:—"These provisions are inconsistent with the idea that the act was framed for the purpose of exercising the general police or superintending power over private property, which is vested in the legislature, or in order to prohibit a use of it, which was deemed injurious to or inconsistent with the rights and interests of the public. If such were the object of the statute, there would be no necessity for the appointment of commissioners,—or for the provisions making compensation to those injured in their property thereby. Such enactments would be unusual in a statute intended only for a prohibition and restraint upon the appropriation or use of private property by its owners; but are the necessary and ordinary provisions where the legislature intend to exercise the right to take it for a supposed public use."

It has been determined, by a course of decisions in Massachusetts, that the power of the legislature to pass this and similar acts lies in an express provision of the Constitution, wherein it is expressed that, "Full power and authority are hereby given and granted to the said general court, from time to time to make, ordain and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this common wealth,—"(Constitution of Mass., Pt. II, Chap. I, Art IV.)

In Dingley vs. Boston, 100 Mass., 544, Mr. Chief Justice Chapman says, "But where the sanitary condition of a large city requires an interference with the real estate of a great number of persons, making expensive and essential changes in the condition and character of the land, a case is presented within that clause of the Constitution which confers authority upon the legislature to make all manner of wholesome and reasonable laws, so as the same be not repugnant or contrary to this Constitution, Part 2, c. 1, Sec. 1., Art. 4."

See also Lowell v. Boston, 111 Mass., 454, 471.

This clause of the constitution expressly says that this general power of the legislature to enact laws for the good and welfare of the commonwealth is limited "so as the same be not repugnant or contrary to this constitution." It has due regard to other provisions of the constitution, protecting private property and private rights. It has further received a judicial construction at the hands of the Supreme Judicial Court of Massachusetts, since the decision of the case at bar in the lower court, which clearly shows that laws passed thereunder must have due regard to other provisions of the constitution.

In Turner v. Nye, 154 Mass., 579, Mr. Justice Morton in speaking of this provision says:— "The provision above quoted does not authorize the Legislature to take property from one person and give it to another, nor to take private property for public uses without compensation, nor wantonly to interfere with private rights. These are always to be carefully guarded and protected."

If, therefore, the act of June 1, 1867, was passed under the authority "to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances,—so as the same be not repugnant or contrary to this constitution" (as Dingley v. Boston, *infra* decides), and if this "provision above quoted does not authorize the legislature to take property from one person and give it to another, nor to take private property for public uses without compensation," (Turner vs. Nye, *supra*) then it is submitted that no title to the land in question ever passed to the City of Boston, because no compensation was ever actually paid to the owners.

II.

It is urged by the defendant that the act in question, because it provides a mode for ascertaining the amount of compensation, is constitutional, and to that proposition the plaintiffs in error make no dissent, but unless compensation for the land taken and appropriated is actually made, no title passes; in other words, the plaintiffs in error assert that the title to the land did not *vest* in the City of Boston, un-

less compensation had, in a form to comply with the requirements of the constitution, actually been made.

It is a prime requisite that compensation shall be made for the appropriation of lands for public purposes.

Cooley Const., Lim., p. 699.

It is incumbent on the party taking or his grantee to prove that this constitutional provision has been complied with, or else title derived under the act of condemnation will be invalid. The construction and application of this constitutional provision should be vigorously upheld in its full extent and fair meaning, as affording the only adequate security and protection to private property.

Dill. Mun. Corp. (3d Ed.) Sec. 612.
People *ex rel* v. McRoberts 62, Ill., 38, 43, 44.
Stacy v. Vermont Cent. R. R. Co. 27, Vt. 44, 46.
Balt. & Susquehanna R. R. Co. v Nesbit, 10 How., 395.

In all the cases which we have examined, where the fee of the condemned land has become vested in a municipal or other corporation, the compensation for the land taken has been made, and the courts have all declared such to be a constitutional prerequisite to the vesting of the title. In all where there have been attempts on the part of the former owners, although they have been paid the full value of the land taken, either to recover subsequently the land itself or to prevent the municipal or other corporation from selling or disposing of it, on the ground that the municipal or other corporation, upon an abandonment or vacation of the use for which it was originally taken, had no right to put the property to a different use than the one contemplated by the special act, compensation had been made. In no case, however, have we found that where compensation has not been made, has the title vested, either by virtue of the act of the legislature or by the taking and use of the land, without first having compensated the owner.

Thus in the Water Works Co. of Indianapolis v. Burkhart 41 Ind. 364, the compensation has been made. (p. 366.)

So also in Brooklyn Park Com'rs v. Armstrong 45 N. Y. 234, 339, just compensation was awarded.

See also
Coster v. New Jersey R. R. Co. 23, N. J. 227.
In De Varaigne v. Fox 2 Blatch. 95, the compensation was paid. (p. 97.)

Wheeler v. Rochester & Syracuse R. R. Co., 12 Barb. 227.
Baker v. Johnson, 2 Hill, 342.
Heyward v. The Mayor of New York, 3 Seld. 214.

In Baker v. Johnson, *supra*, it was expressly decided (p. 347) that the absolute fee did not pass until the appraisment and payment of damages to the owner.

See also
Bloodgood v. Mohawk & Hudson River R. R. Co., 18 Wend, 19, (per Walworth Chan.)
See also *ibid* per Senator Edwards, p. 25 *et seq.*)
(" " " " Maison, p. 32, ") 35, 42,

"The fee is vested simultaneously with the payment of the damages and not before," *ibid*, per Senator Maison, p. 44.

That compensation must be simultaneous with the taking, see also

Walther v. Warner, 25 Mo. 277, 286.

In the conclusion of the opinion of the court in this case, Mr. Justice Leonard says:—"We remark here, in conclusion, that all the cases in all the books seem to assume that an individual cannot be *absolutely deprived* of his property without the *actual payment* of the assessed price, even though a proper provision for its payment be made in the act authorizing the taking of it; and perhaps it would be better to hold, even in the cases where the proper provision is made for the payment of the price, so that the property is allowed to pass, it passes subject to the condition that the price shall be subsequently paid, so that if for any cause it be not paid, the party may repossess himself of it on account of the condition broken."

In City of San Francisco v. Scott, 4 Cal. 114, Mr. Chief Justice Murray says;—"Our bill of rights provides that private property shall not be taken for public use, without just compensation being made therefor, and it is now the better opinion that such compensation must be made before the citizen can be divested of his rights. It is not sufficient that the law points out the mode by which the damage may be ascertained and provides the party with a remedy to enforce his rights; no such obligation can be imposed upon him; he is entitled to the damages which he has sustained, without resorting to a legal tribunal to enforce the payment. The law watches the exercise of this prerogative of sovereignty with a zealous regard for the rights of a citizen."

Fox v. The Western Pacific R. R. Co., 31 Cal. 538, 555.
Henry v. The Dubuque & Pacific R. R. Co., 10 Iowa, 540.
Ferris v. Bramble, 5 Ohio, St. 109.

See also State v. Graves, 19 Md., 351.
Bonaparte v. The Camden & Amboy R. R. Co., Baldw. 205.
Cushman v. Smith, 34 Me., 247.
Nichols v. Somerville & Kennebec R. R. Co., 43 Me., 359.

The case of Cushman v. Smith, *supra*, was an action of trespass, *quare clausum*, where the defendant claimed title to the land in question as mortgagee in possession from the Buckfield Branch R. R. Co., which had obtained the land by virtue of an act of the legislature to take and hold lands, and to compensate the owner for the land taken in a certain prescribed mode, but no compensation ever was made, and it was held that a provision of a constitution which recites that "private property shall not be taken for public use, without just compensation," precludes the acquisition of any title or easement or permanent appropriation without the actual payment or tender of compensation.

In the case of Kennedy v. Indianapolis, 103 U. S. 599, the facts in the case briefly stated were these: An act of the legislature of Indiana, passed Jan. 27, 1836, authorized the board of internal improvements to construct the Central Canal, and for this purpose to enter upon, take possession of and use any lands necessary for the prosecution and completion of the work; and provided that persons injured by what was done could claim damages, which were to be appraised in a certain way, but in making the appraisement the benefits resulting to the claimant were to be taken into consideration, and any sum found to be due was to be paid by the board, but no claim could be recovered or paid unless made within two years after the property was taken possession of. The board was also authorized to acquire, by donation or purchase for the State, the necessary ground for the profitable use of any water power that might be created by the construction of the canal, and to lease for hydraulic purposes any surplus of water there might be over and above what was required for navigation.

The constitution of Indiana read, "That no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefor."

The canal, about 1840, was built, and the land involved in the suit was taken, but no compensation was ever made to the then owner. In 1850 the legislature passed an act to sell the canal, and

the land in question was sold, and the question as presented, was the appropriation by the State sufficient to divest the owners of their title, and convey to the purchasers under the act of 1850 any title to the premises. The case was a bill in equity brought to quiet the title to these lands by the grantees from the purchaser under the sale thereof by virtue of the act of 1850.

According to the later decisions of the Supreme Court of Indiana, when lands were taken by the State under the internal improvement laws, and just compensation made to the owners, the title in fee was transferred from the owner to the State.

Water Works Co. of Indianap. v. Burkhart, 41 Ind., 364.
Nelson v. Fleming, 56 Ind., 310.

Mr. Chief Justice Waite, in delivering the opinion of the court, says, in reviewing the Indiana cases:—"But, so far as we have been able to discover, it has never yet been held that the title passed out of the owner until 'just compensation' had actually been made. In fact the decisions appear to have been uniformly to the effect that it did not." After referring to the New York and Maine cases, cited *supra* in this brief, he says:—"Not to multiply cases further, it seems to us that on principle and authority the rule is, under such a constitution as that of Indiana, that the right to enter on and use the property is complete as soon as the property is actually appropriated under the authority of law for a public use, but that the title does not pass from the owner without his consent until just compensation has been made to him. . . . It is not contended that compensation in money was ever made for any of the land in dispute. . . . To hold that the title passed by mere appropriation, if no claim for damages was made within the two years, would be in effect to decide that if the State entered on land for a particular use and kept possession as against the owner for two years, it got a title in fee whether the property was ever put to the use or not. Such we cannot believe to be the law."

See also
Kennedy v. Indianapolis, 11 Biss., 13.
Avery v. Fox, 1 Abb., U. S., 246.

See also
Doe v. Georgia R. Co., 1 Ga. 524.
Young v. McKenzie, 3 Kelly (Ga.,) 524.
Blodgett v. Utica, etc., R. R., 64 Barb., 580.
Powers v. Bears, 12 Wis., 213, 222.
Brock v. Hishen, 40 Wis., 681.
Davis v. San Lorenzo R. Co., 47 Cal., 517.
Brady v. Bronson, 45 Cal., 640.

San Mateo Water Works v. Sharpstein, 50 Cal., 284.
McAulay v. Western Vermont, etc., R. Co., 33 Vt., 311.
Gray v. First Div. of St. Paul, etc., R. Co., 13 Minn., 315, 322.
Hursh v. First Div., etc., 17 Minn., 439.
Warren v. First Div., etc., 18 Minn., 384, 396.
Hall v. The People, 57 Ill., 307, 316.
The People v. Williams, 51 Ill., 63.
Shute v. Chicago, etc., R. Co., 26 Ill., 436.
Daniels v. Chicago & Northwestern R. R. Co., 35 Iowa, 129, 134, 136.
Atchison, Topeka & Santa Fe R. R. Co. v. Weaver, 10 Kan. 344.
Smith v. Chicago, Alton & St. Louis R. R. Co., 67 Ill. 191.
Ford v. Chicago & Northwestern R. R. Co., 14 Wis. 609.
Graham v. Columbus & Indianapolis Central R. R. Co., 27 Ind. 260

If possession of the property had been actually taken without compensation to the owner, then the owner becomes entitled to recover possession by an action of ejectment.

Doe. v. Georgia R. Co., *cited supra*.
Gardner v. Tisdale, 2 Wis., 153.
Weisbrod v. Chicago, etc., R. Co., 21 Wis., 602.
Wager v. Troy Union R. Co., 25 N. Y., 526.
Lazier v. New York Central R. Co., 42 Barb., 466.
Nichols v. Lewis, 15 Conn., 136.
McClinton v. Pittsburg, etc., R. Co., 66 Pa., St., 404.
Chicago, Burlington, etc., R. Co. v. Knox College, 34 Ill., 195.
Walther v. Warner, *cited supra*.

The fact that opportunity was provided in the act for compelling compensation is not sufficient, and there is no obligation imposed on the owner to resort to a legal tribunal to enforce payment.

In addition to cases *cited supra*, see also
Orr v. Quimby, 54 N. H. 590, 642.
Piscataqua Bridge Co. v. The N. H. Bridge Co., 7 N. H., 35, 70.
Shepardson v. Milwaukee, etc., R. Co., 6 Wis., 613.
Lee v. North Western, etc., R. Co., 33 Wis., 222.

As early as the year 1795, it was decided that the nature of the compensation to fulfil the requirements of the constitution must be in

money: "No just compensation can be made except in money. Compensation is a recompense in value, a *quid pro quo* and must be in money," Mr. Justice Paterson in

Vanhorne v. Dorrance, 2 Dall., 314, 312.
See also Carson v. Coleman, 3 Stockt., 106, 108.

Without compensation, and that too in money actually paid to the owners by the city of Boston, the latter did not become vested with the title in fee to this land, and conversely the owners did not become divested of their title in fee.

See also
Jones v. The Wills Valley R. Co., 30 Ga., 43.
Butler v. The Sewer Com'rs, 10 Vroom, 665.
The Central R. R. Co. v. Holler, 7 Oh. St., 218, 225.
Pumpelly vs., Green Bay and Mississippi Canal Co., 13 Wall, 166.

In Page vs. O'Toole, 144 Mass. 303, the court decided that the omission of some such word as "thereupon," before the provision as to the title vesting in the town, shows that it was not the intention of the legislature to define at what moment the title vested in the city.

From the whole course of the subsequent action and proceedings by the city of Boston in respect to this land, it will be seen,

(1.) That the city of Boston almost immediately after the passage of the act, virtually and totally abandoned proceedings under the terms of this act, and so no title vested in the city.

A municipal corporation to which the right of eminent domain has been delegated by the legislature for public purposes may discontinue proceedings instituted by them to acquire title to lands, at any time before the title is acquired.

In the Matter of Com'rs of Wash. Park, 56 N. Y. 144, 153.
The matter of Anthony Street, 20 Wend., 620.
Water Com'rs of Jersey City, 31 N. J. (2 Vroom), 72.
State v. Hug, 44 Mo. 116.
Matter of Military Parade Ground, 60 N. Y., 319, 323, 324.

As evidence of the fact that the city did not proceed under the act so far as this land is concerned, we find

(1.) That the records in the Board of Alderman show that a joint special committee recommended a different plan, viz.; instead of paying for the land, to give a bond to the former owners of the

estates to return the land, a thing that the act does not authorize, upon the condition that the former owners would make all the necessary repairs upon the estates returned, etc.; but this was not however done,

Record p. 8.

(2.) That the city of Boston never had the exclusive possession of this land, nor did it interrupt Robert Knott (the tenant in possession at the time of the passage of this act, and who it is assumed represented only this life estate of Henry Tallman,) in his possession of the land but permitted him to remain there and convey it by *warranty deed* to Christian Rechel, excepting therefrom any claim which it might have for the improvements made.

Exhibit L. Record pp. 31, 32.

(3.) That the city of Boston, through its officers, considered the title to remain in the former possessors of it, as appears in the resolution of the committee of this Church street district dated Nov. 19, 1869, where it votes to settle with Robert Knott for all damages occasioned under the act of June 1, 1867, and reconvey the estate, in consideration of *his paying* a certain sum of money for a betterment assessment and any charges for extra work, etc. No such authority is given to the city to assess for betterment improvements,—it is only to purchase or take upon compensation.

Record p. 10.

See also city papers dated January 12, 1870. (Record p. 12.)

(4.) That the taxes during this period from the time of the passage of this act to the time of the conveyance by the city were paid by Knott. (Record p. 12.) If the city had become vested with the fee simple title to this land, the owners should not have been assessed for taxes. To have their land taken from them and to be assessed and required to pay a tax on that very land is, to say the least, an unprecedented act.

(5.) That nearly three years from the time of the passage of this act, and nearly two years from the time of the resolution of the city officers asserting the taking of the land, elapsed before any attempt was made to settle with the apparent owners of this land.

Meantime, had the period elapsed in which the owner would have been entitled under the act to recover from the city the value of the land or damage for injury done to it? The act prescribed one year in which to bring a suit against the city; but we find that

nearly two years afterwards the city was attempting to make a settlement with the party in possession at the time of the alleged taking, and that no attempt at settlement had been made before that. Meantime had the city acquired such a vested title to the land that the city was under no obligation to pay for the land or damage thereto?

Kennedy v. Indianapolis, *supra*.
Richardson v. Vermont Central R. R. Co., 25 Vt., 465.

III.

The Circuit Court erred in holding that the land taken under the act vested the fee in the city as absolute owners, without the payment of compensation to the owners, and that from the conclusions of the court in Dingley vs. Boston, the plaintiffs have no right to maintain this action. It admits that in Dingley vs. Boston, the question of compensation was not directly raised or passed upon; and consequently Dingley vs. Boston, did not decide that the land taken under the act vested a fee in the city as absolute owners without compensation to them. It does not logically follow from the conclusions of the court in that case, that the plaintiffs have no right to maintain this action.

The case of Dingley vs. Boston, decided two things: First, that the act was constitutional; and, Second, that a title in fee simply vested in the city, but as the plaintiffs in error assert only on condition that compensation was actually made.

The present action is one to determine title, and is not a question of remedy under the act. That the court in Dingley vs. Boston, had in mind clearly that compensation should be made to the owners, appears from the language used in speaking of the mode devised to make the public improvement under the act,—"On the whole, therefore, the plan of compelling the city to take the land in fee simple, and the owner to part with his whole title *for a just compensation*, would seem to be the most simple and equitable that could be adopted. The constitution provides for the protection of all private property, and it provides that when the public exigencies require that the property of an individual should be appropriated to public uses, *he shall receive a reasonable compensation therefor*."

Again "If, for example, in time of war the government were to take timber for a ship of war, or horses for the army, and *pay for them*, no one would suppose that the owner could reclaim his property after the war was over; or that the government having ceased to use it could sell it, and give a good title to it." The court recognizes that payment of compensation is necessary to fulfill the constitutional requirement before title absolutely vests.

The case recognizes the right of the owner to receive compensation for his land, and it does not say that the title to the land vests in the city without compensation, but clearly affirms the right of the owner to compensation. The present case is one which admits the constitutionality of the act, and admits that the title in fee vested in the city of Boston, provided the constitutional requirement that compensation should be first made to the owner before title vests, is complied with.

The purpose of the suit of Dingley vs. Boston, was to prevent the city from putting to a different use land taken under the act other than that specified in the act itself. In the case at bar, the question is whether any title passed without compensation. In Dingley vs. Boston, it was urged in argument among other things, that the title taken was in excess of that required to effect the object of the act, and it was upon that question only that the court held that the act allowed the city to take a fee in the land. As it did not appear that compensation had not been made to the owner, it may be assumed, therefore, from aught that appears, that the owner received his compensation for the land taken, and afterwards attempted to restrain the city from putting the land taken, and paid for, to a different use, or prevent the city from selling it. This the court said the former owner could not do.

The case of Bancroft vs. Cambridge, 126 Mass., 438, is cited in the opinion of the Circuit Court not as conclusive of the present case, but as illustrative that the present act was passed in exercise of the police power of the legislature, and that the act in question can be justified under that power. From a comparison of the act commented upon in that case, it will be seen that it is totally different from the act involved in this case. The act in Bancroft vs. Cambridge, was a regulation or restraint solely upon the owners in the use of their property, and it gave the municipality authority to raise the grade of the land, and made the expenses a lien or charge on the lands filled to be collected in the manner provided for the collection of taxes on real estate. In other words it belonged to that class of cases, in which the owners of lands are required to make an improvement for the benefit of the public, and the whole expense thereof is charged to them. It is based however, upon the theory that there is a consequent increase in the value of the owners' lands.

Tiedeman's Lim. of Pol. Pow., Sec. 124, page 445.

But there is no *taking* of the land by the municipality. The act then provides that the owner may, if he is dissatisfied with the assessment of the expenses of raising the grade of his land, within a certain time apply for a jury to revise the same, and he may, instead of applying for a jury give notice within a certain time of his dissatis-

faction, and the city shall thereupon take the land, and shall within sixty days file in the registry of deeds a description of the same, and a statement that it is taken under the provisions of the act; and further it allows the owner within six months from the time of the filing of such description and statement to apply for a jury to determine the damage done to him, and proceed in the same manner as he would proceed under the statute in the laying out of highways. It should be noted that the only way in which a municipality could take the land was with the owner's consent, far different from the act in the present case, which takes the land without the owner's consent. The landowners in Bancroft vs. Cambridge, gave notice of their dissatisfaction with the assessment, and requested the city to take the land according to the provisions of the act. The case of Bancroft vs. Cambridge arose on petition of a land owner to the county commissioners for a jury to assess damages for the taking of the land, and the only questions raised and determined were, First, whether the owner was entitled to his damages as of the day when the notice was given to take the land, or the day when the city filed the description and statement in the registry of deeds, and the court decided that the damages should be as of the day when notice to the city was given; and Second, whether the loss and inconvenience occasioned by the proceedings of the city are proper elements in the assessment of damages, and the court held they were not.

The taking of the land depended entirely upon the owner's election and differs materially from the act in question which takes the land contrary to the owner's will. The case from its nature did not involve the question of title, nor the consideration of the constitutional provision requiring compensation. It considered that the act involved in its consideration was at the most a regulation and restraint of the owner's use of his land, and gave only to the owner a right of election if he saw fit to have the municipality take the land.

In this view it was proper for the Court to declare that the act was in exercise of the police power of the legislature, but we have no doubt that according to the later decisions of the same Court, the act would be placed upon the other constitutional provision embodied in the constitution of Massachusetts, Part 2, Chapter 1, Art. 4. as the acts considered in Dingley vs. Boston, Lowell vs. Boston, Turner vs. Nye, and the Mill and kindred acts have ultimately been placed.

IV.

The act in question was not passed under the general police power of the legislature.

As we have before seen, the case of Dingley vs. Boston decides that the act in question was passed under the authority given the

legislature by the clause of the constitution which conferred authority upon the legislature to make "all manner of wholesome and reasonable laws so as the same be not repugnant to this constitution." It is not an act which was passed under what are called "the general police powers of the legislature." Under this clause of the constitution many acts have been passed which cannot be referred to the police power of the legislature, and which are upheld by the Courts as constitutional under this clause. The Court itself in Dingley vs. Boston, does not base the act upon the police power of the legislature. There is no expression of that idea in the case; and it further makes reference to a case, (Hingham & Quincy Bridge and Turnpike Co., vs. County of Norfolk, 6 Allen 353,) in which Mr. Chief Justice Bigelow referring to this clause of the constitution, says:—that "it was one of the main purposes of this clause to vest in the legislature, a superintending and controlling authority under and by virtue of which it might enact *all laws* not repugnant to the constitution of a police and municipal nature and necessary to the due regulation of the internal affairs of the state." In that case it was an act entitled "to authorize a legislative act, taking, for the purpose of laying out a highway, a turnpike and bridge." It cannot be claimed that taking private property for the purpose of laying out a highway is an exercise of the police power. The Court in Dingley vs. Boston, designedly limited the scope of this clause in the constitution by selecting an act which is clearly one not in exercise of police power, but of eminent domain. The inference cannot be drawn from this illustration by the Court, that the act in question is an exercise of the police power; on the contrary the Court would be more likely to use as an illustration an act as nearly as possible like the act in question.

It is clear that acts of eminent domain are upheld by referring to this clause of the constitution.

In Lowell vs. Boston, *supra*, we find a great variety of acts referred to which have been upheld as constitutional under this clause; such as the regulation of rights of riparian owners, laws regulating the conduct of joint tenants, proprietors of wharves, the construction of drains and sewers, previous to 1841, (the Court saying:—"No other power was exercised for the construction of drains and sewers until 1841,") statutes for the improvements of meadows, mill acts, etc. The Court says:—"The former" (*i. e.* the general welfare clause,) "expresses the ultimate purpose or result sought to be obtained by all forms of exercise of legislative power over property." It appears clearly therefore, that the act in question having been passed under this clause of the constitution, it is something more than a police law or regulation, and must have due regard to the rights of property secured by other clauses in the constitution; and not only must those rights be secured, but the constitutional provision must be fulfilled.

The provision in the act for compensation is not a mere gratuity as would be the case if it were a pure police law or regulation, but is essential in order to give the act vitality, and render it constitutional.

The Circuit Court decided that the land was not taken under the right of eminent domain, but under the police power of the state. If so, no compensation to the owner for the land taken need be made. It is a *taking* of property from an individual, and giving it to another without compensation, and no Court has heretofore justified such a proceeding. It is contrary to the principle under which acts of the legislature in exercise of the police power have been passed. It is not the owner's use of the property which is destroyed, but the property itself which is taken. It is not a regulation of the use of the property under the maxim, "*sic utere tuo ut alienum non laedas*," but is a confiscation and appropriation of property without compensation.

In Commonwealth vs. Alger, 7, Cush. 53, Mr. Chief Justice Shaw says:—"It is settled that every holder of property, however absolute his title may be, holds it under the implied power that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. It is held subject to such restraints and regulations established by law as the legislature under the governing and controlling power vested in them by the constitution may think necessary and expedient.

This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution to establish all manner of reasonable laws not repugnant to the constitution as they shall judge to be for the welfare of the state. The appropriation of private property to public use is by virtue of the right of eminent domain; but the restraint of an injurious private use is under the principle of the police power."

In no case in Massachusetts has the police power been enlarged to include the taking of private property, except in case of forfeiture for crime, Dingley vs. Boston, p. 556.

In State vs. Tewksbury, 11 Met. 55, under the statute forbidding any person to remove sand from beaches in Chelsea, it was held that this was not a taking of private property for public use, but is a just and legitimate exercise of the power of the legislature

to regulate and restrain such particular use of property as would be inconsistent with, or injurious to the rights of the public.

In Fisher vs. McGirr, 1 Gray, 1, it was held that liquors could be seized and confiscated in order to abate the nuisance, and to punish the offender, and the property might be sold for the public benefit, or destroyed. This was in the nature of a punishment on the offender, and a forfeiture of property for crime.

In Talbot vs. Hudson, *supra*, the act was held to be in exercise of the right of eminent domain, and not one of police regulation.

In the City of Salem vs. The Eastern Railroad Company. it was held that while the regulation prescribed by the act might seriously interfere with the enjoyment of private property, and disturb the exercise of valuable private rights, no previous notice to parties was necessary, because it was a police regulation to which all individual rights of property were held subject.

In Blair vs. Forehand, 100 Mass. 139, it was held that regulations in regard to property for preventing injuries to the rights of others were justified under the police power.

In Watertown vs. Mayo, 109 Mass. 315, the court approves of the definition of the police power given by Blackstone, as "the due regulation and domestic order of the kingdom, whereby the inhabitants of a state, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious, and inoffensive in their respective stations." The laws passed in the legitimate exercise of this power are not unconstitutional, although in some measure interfering with private rights, merely because they do not provide compensation. It differs from the right of eminent domain which involves the appropriation of private property to public use, and requires in all lawful exercise, plenary compensation for the loss inflicted on the owner.

In Young vs. Blaisdell, 138 Mass. 344, it was held that statutes regulating the manufacture and sale of intoxicating liquors, are laws in the nature of police regulations, necessary to the public benefit, and although they impose restrictions upon the use of property without giving the owners a right to a trial by jury, they are constitutional.

In Rideout vs. Knox, 148 Mass. 368, held that the statute regulating the height of fences subsequently built is constitutional, in that it restricts obnoxious use of the owner's premises. And although the use is not directly injurious to the public at large, there is a public interest to restrain this kind of aggressive annoyance of one neigh-

bor by another to mark a definite limit beyond which it is not lawful to go.

In Kingman *et. al.*, petitioners, 153 Mass. 570, the act was held analagous to Talbot vs. Hudson *supra*. But as we have before seen, Talbot vs. Hudson was held a case of eminent domain.

The nature and extent of what is known as the police power has been lately under discussion in this court in the case of Lawton vs. Steele, 152, U. S. 133, and the cases in this court heretofore, are referred to and discussed; but in no case it is submitted does the police power of a state extend to the taking of property, Perhaps the most extreme case under which the power has been justified is where the state has passed laws authorizing the destruction of a building falling to decay, or otherwise endangering the lives of the passers-by, or the demolition of such as are in the path of a conflagration, but even in those extreme cases, the property is not taken, and the title vested under the police power.

Under this power it is possible for the legislature to pass an act to transfer the property of A to B without his consent, and as Mr. Justice Story in Wilkinson vs. Leland *et. al.*, 2 Peters, 627-658 says. "We know of no case in which a legislative act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any state in the Union, On the contrary it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced."

Respectfully submitted,

THOMAS A. JENCKES,

Of Counsel for Plaintiffs in Error.

Brief for Plaintiffs in Error.

THE SUPREME COURT OF THE UNITED STATES.

No. 122.

WILLIAM H. SWEET AND MARIA H. SWEET, HIS WIFE, AND FRANK G. TALLMAN AND PELEG H. TALLMAN,

—Plaintiffs in Error.

vs.

CHRISTIAN RECHEL.

ON WRIT OF ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

THOMAS A. JENCKES,
JAMES E. LEACH,
Counsel for Plaintiffs in Error.

The Supreme Court of the United States.

OCTOBER TERM, A. D. 1894.

WILLIAM H. SWEET AND MARIA H. SWEET, HIS WIFE, AND FRANK G. TALLMAN AND PELEG H. TALLMAN, *Plaintiffs in Error*,
vs.
CHRISTIAN RECHEL.

No. 122.

STATEMENT OF THE CASE.

This is a writ originally brought in the Circuit Court of the United States for the District of Massachusetts to determine the title to certain real estate, situated in the City of Boston. The plaintiffs in error claim title to this real estate in the following manner, viz: Peleg Tallman, of Bath, in the County of Lincoln and State of Maine, died March 12, 1840, seized and possessed of certain real estate in Boston, part of which is involved in this present suit, leaving a last will and testament under the following clause of which he devised this real estate, viz: "Item 16. I give, devise and bequeath to my son, Henry Tallman, three dwelling houses, situated on the southerly side of Pleasant Street Court, bought by me from Joseph N. Howe; one other lot of land on the same side of said street bought by me of Mrs. Parker, to hold to said Henry during his natural life and at his decease to descend to his son, Peleg Tallman, Jr."

The will was duly proved in the Probate Court of Lincoln, Maine, March 29, 1841, and a copy thereof in the Probate Court of Suffolk County, Mass., May 10, 1841. (Exhibit A, Record pp. 13–20.)

The plaintiffs in error, Frank G. Tallman and Peleg H. Tallman, are the children and heirs-at-law of, and Maria H. Sweet, the widow of, Peleg Tallman, Jr., she after the death of her husband, which occurred April 15, 1863, marrying William A. Sweet, of Syracuse, N. Y. Peleg Tallman, Jr., at the time of

his death was in his twenty-seventh year, having been born April 28, 1863. Frank G. Tallman was born January 26, 1860, and became of age January 25, 1881; and Peleg H. Tallman was born October 13, 1862, and became of age October 12, 1883.

Henry Tallman, the life tenant under the will, died May 4, 1885, aged seventy-seven years and nine months.

The present suit was commenced September 30, 1885, soon after the death of the life tenant, Henry Tallman.

At the death of the above testator, Peleg Tallman, the estate devised passed to Henry Tallman for life, and the remainder in fee to Peleg Tallman, Jr. At this time the remainderman was an infant, and did not become of age until April 17, 1857.

Henry Tallman was named as an executor of the will, together with one Eleanor Tallman, who declined to act, and letters testamentary were issued to him by the judge of probate for Suffolk County, May 10, 1841, and bond was duly given.

The probate records and records of deeds of Suffolk County, Mass., further disclose:

On October 6, 1843, a petition for guardianship of Peleg Tallman (Jr.), signed by Charles McIntire, approved by Henry Tallman, was presented, and on October 9, 1843, granted, and bond in the sum of $1,000, signed by McIntire, broker, principal, and Thomas Darling, surety, was approved, and letters of guardianship issued to McIntire. (Exhibit B.) On November 13, 1843, inventory of the estate of the ward was filed, and included therein was the land described in the clause of the will of Peleg Tallman (Sr.), part of which is involved in the present suit, "the said minor being entitled to the same after the death of his father, who has a life estate therein." (Exhibit C.) On November 27, 1843, the guardian petitioned the Probate Court for leave to sell the real estate of his ward, the description including the whole tract, of which the tract in this suit forms a part. He alleged the houses were now decaying and going out of repair, and were depreciating, and would continue to depreciate in value on that account, and the residue of the land was unimproved land, and that it would be for the interest of the minor that his real estate should be disposed of and the proceeds invested, etc. The Court ordered him to give notice to the next of kin and all persons interested in the estate by publishing the petition together with the order of the Court in the Boston *Courier* for three successive weeks before the twenty-fifth of December following, the last publication to be three days, at least, before the said twenty-fifth of December. (Exhibit D.)

The files of the Boston *Courier* for the year 1843 disclose that the above notice and petition were published only on

November 29 and December 13, 1843, and on no other date. Notice was not given in accordance with the order of the Court "by advertisement of the foregoing petition, with this order thereon, three weeks successively in the newspaper—the Boston *Courier*, printed at said Boston, the last publication to be three days at least before the twenty-fifth day of December."

On December 25, 1843, the guardian made sworn answer that he had complied with the above order of the Court. (Record p. 23.) On the same day the Probate Court granted him license to sell, upon giving bond and taking the oath required by law (Exhibit E, Record p. 23); and at the same time he gave bond in the sum of $3,000 with surety, and took the oath (Exhibit F, Record p. 24).

On April 13, 1857, over fourteen years after the attempted sale of the minor's interest in the real estate by the guardian under the above license of the Probate Court, and over three years after he had been cited by the Probate Court to make return of the proceeds of sale (Exhibit K, Record p. 31), the guardian petitions the Probate Court that he may be allowed to file an affidavit of the sale of the ward's interest in the property, under the license of the Probate Court, dated December 25, 1843 (Exhibit G, Record p. 25). This petition is on the same day granted, and he files an affidavit, in which he says that, *as formerly* guardian of Peleg Tallman, of Bath, Maine, a minor, prior to making sale of the real estate of the minor, under license from the Probate Court, dated December 25, 1843, he caused notice of such sale to be published in the Boston *Courier*, and attached a copy thereof to his affidavit.

This notice of the guardian's sale (Record p. 26) discloses that the premises will be sold on March 20, at 4 o'clock P. M., without mentioning in what year, and names no place where the sale is to take place. The premises to be sold are described, but no place of sale is named.

On March 25, 1843, the guardian executes a deed of the premises, part of which are involved in this suit, to Henry Tallman for the expressed consideration of fourteen hundred dollars, reciting that the same are subject to the life estate of Henry Tallman, the father of the ward, and to any incumbrances imposed or created by the will of the late Peleg Tallman thereon. (Exhibit H, Record p. 27.) On the same day, however, Henry Tallman conveys to Charles McIntire, guardian of Peled Tallman, in mortgage for $1,300, about one-fourth part of the real estate conveyed by the preceding deed (not including the lot in question), the mortgage deed reciting that it was given to secure the note of Henry Tallman for $1,300, payable

in two years, with interest at six per cent, payable annually (Exhibit I, Record p. 28).

On October 4, 1844, Henry Tallman conveys the lot involved in this suit to Robert Knott by warranty deed (Exhibit J, Record p. 29).

The guardian of the ward Peleg, Charles McIntire, did not account for the proceeds of the sale of the ward's interest in the real estate, either to the Probate Court or to the ward, although on October 31, 1853, he was cited by the Probate Court so to do. (Exhibit K, Record p. 31.) No account of the proceeds of sale was ever made. (Record p. 5.)

On May 17, 1869, after the city of Boston had taken the land under the Act of June 1, 1867 (Chapter 308), Robert Knott conveyed, by warranty deed, the lot in suit to Christian Rechel (Exhibit L, Record p. 31), excepting, however, the "taxes and betterments levied on or to be levied by the city of Boston, which are to be paid by said Rechel." The defendant has been in the occupation of the lot in suit from 1860, as tenant to Robert Knott, until he acquired the title of Robert Knott, and has been, from that time to the present, except as the same was taken by the city of Boston under the Act of June 1, 1867, Chapter 308.

On March 14, 1870, Robert Knott gave a release to the city of Boston, of all damages for taking his real estate under the Act of June 1, 1867, Chapter 308, (Exhibit M, Record, p. 33); and on the same day the city of Boston, in consideration of that release and of a certain sum of money, conveyed to Christian Rechel the lot in suit. (Record p. 11.)

The taxes for the year 1869, during the period while the city, it is claimed, had the title to this lot, were paid by Rechel. (Record p. 12.)

It is admitted that no compensation was ever paid by the city of Boston to the plaintiffs in error, who, it is claimed, were the legal owners, in fee simple, of this land, at the time of the taking of the land by the city, under the Act of June 1, 1867, Chapter 308. (Record p. 12.)

The lot in suit was taken with other lands in a certain district, under the Act of June 1, 1867, Chapter 308. (Record p. 67.)

As to the action taken by the city of Boston, it appears that a joint special committee was appointed, and in their report to the Board of Aldermen, April 13, 1868, certain recommendations were made. (Record pp. 7 and 8.)

An instrument appears of record, which recites that the city of Boston takes the lot in suit (Record pp. 8 and 9), and within sixty days of the time of taking, on May 22, 1868, the same was filed for record. The city raised the grade of the

land and the buildings thereon, the territory was laid out and filled, a system of drainage was provided, the nuisance abated, and the value of the land enhanced. The lot in suit was filled and the buildings raised. (Record p. 9.)

On June 8, 1868, commissioners were appointed by the board of aldermen and city council in concurrence, and on November 28, 1868, the commissioners were authorized to "settle and adjust damages for the taking of lands in the Church Street district, so called, with the former owners thereof, severally, upon such terms and conditions as they shall deem expedient, and in making such settlement the mayor is authorized to reconvey the several parcels," etc. The committee, on November 19, 1869, voted to settle with Robert Knott by reconveying the land to him or his assignee upon the payment of a certain sum per foot for extra land, and an assessment for betterment, etc. (Record p. 10), and subsequently the city conveys the lot to Rechel as above set forth. (Record p. 11.)

The Supreme Court of the United States.

OCTOBER TERM, A. D., 1894.

WILLIAM H. SWEET AND MARIA H. SWEET, HIS WIFE, AND FRANK G. TALLMAN AND PELEG H. TALLMAN, *Plaintiffs in Error*,

vs.

CHRISTIAN RECHEL.

No. 122.

LAW BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR ON MATTER OF GUARDIAN'S SALE.

Defects of procedure in the Probate Court of Suffolk County in relation to the sale of the real estate of the ward Peleg Tallman, Jr., and subsequent acts of guardian, to divest the ward of his title to this real estate.

Sales of land of a minor ward under the extraordinary powers given to a guardian by proceedings in a court of probate should strictly follow the orders and directions of the court of probate having power to grant a license to sell, or the sale will be irregular and void, and the purchaser will obtain no title thereunder.

Woodcock vs. Bowman, 4 Metc. (Ky.) 40.

The first defect is a jurisdictional one.

Courts of probate are creatures of the statute and are of inferior and limited jurisdiction. They must follow strictly the statute which creates them and gives them power and authority to act in certain cases.

Corwin v. Merritt, 3 Barb. 341.
Dakin v Hudson, 6 Cowen, 221.

At the outset, we are met by the question, what were the legal relations existing between this guardian and his ward in respect to this real estate. It has been held in Massachusetts that "a guardian appointed by our laws is the mere agent of his ward, having an

authority not coupled with any interest." Mr. Ch. Just. Parsons in

Granby v. Amherst, 7 Mass., 6.

Again Mr. Ch. Just, Shaw says:—"It is true there is some distinction between the official character of an executor and that of a guardian. The property of the estate is vested in the former, and the latter is an agent, having an authority not coupled with any interest in the property?"

Manson v. Felton, 13 Pick., 211.

If, therefore, the guardian has no interest in the real estate of his ward, and he applies to the Probate Court for leave to sell the interest of his ward in the real estate, is the proceeding adverse to the ward?

That it is adversary in its nature to the ward, see

Good v. Morley, 28 Iowa, 188, 193.
Washburn v. Carmichael, 32 Iowa, 475.
Lyon v. Vanatta, 35 Iowa, 521.

The proceedings in the probate court being adversary to the ward, there is as much necessity of notice to the ward of the pendency of proceedings to divest him of his title as there is necessity of notice to other parties who may be interested in the same estate.

It has been held in Mississippi that in a proceeding in the probate court, for the sale of real estate of minors upon a petition of the guardian, it is indispensible that a *guardian ad litem* be appointed to represent their interests, and if no such appointment be legally made, the decree will be void, and a sale thereunder will vest no title in the purchaser.

Mr. Justice Handy says:—"There is as great a necessity for the appointment of a *guardian ad litum*, to protect the interest of the minor in the probate court, as in a court of chancery. Rights of the greatest importance are settled: and no reason is perceived why the modes of proceedings which have been found necessary to protect the interests of infants, in the latter court, should not be required in the former."

McAllister v. Moye, 30 Miss., 258.
Stanton v. Pollard, 24 Miss., 154.

The Rev. Stat. of Mass., Ch. 72, Sec. 8, (Gen. Stat. of Mass., Ch. 102, Sec. 39,—Pub. Stat. of Mass., Ch. 140, Sec. 15), provide that:

"No license shall be granted to a guardian until after notice, by public advertisement or otherwise as the court shall order, shall have been given to the next of kin of the ward and to all persons interested in the estate, to appear and show cause why the same should not be granted."

The statute leaves the manner of giving notice to the parties interested in the estate to be sold to the court before which the petition for a license to sell is pending, and as will be observed is imperative in its terms and peremptory in its nature.

The legal effect of leaving to a court the power to prescribe the time and manner of giving notice is best illustrated in the words of Mr. Justice Beck, in Good v. Morley, cited *supra*. "If in its wisdom the legislature has left the form, substance and time of service of process under the control of the court out of which it issues, it certainly has that power, and process so provided for, possesses precisely the same character as though it were the creation of express provisions. In short the legislature has power to provide for process and prescribe its substance and the manner and time of service, or to clothe the courts with that power."

See also Mason v. Messenger & May, 17 Iowa, 268.
In re Empire City Band, 18 N. Y., 199.

The legislature having left it to the court to prescribe the notice and the manner of giving it, and the court having made the order prescribing that the notice should be given by publishing the petition together with the order of the court in the Boston *Courier* for three successive weeks before the twenty-fifth of December following, the last publication to be at least three days before the said twenty-fifth of December, the order of the court became then and there a part of the statute, the same as if it had been read into the statute itself. The order of the court was in the nature of first process to bring the parties before the court, and was essential, before the court could make any order or decree that would bind the parties or affect their title or interests in the property. Failure to comply with the order strictly, as in this case, prevented the court from acquiring jurisdiction, and any subsequent order or decree therein was void. The court assumed in this case that the order, which we claim was in the nature of first process, had been complied with, and went on to make an order granting a license to sell, but if it did not *in fact* have jurisdiction over the persons interested in the estate, then the order would be void.

As has been said by Mr. Justice Cole in

Newcomb v. Dewey, 27 Iowa, 381, 388, the question in every case upon principle is whether the court, in fact, did have jurisdic-

tion, not whether it decided that it had jurisdiction. And the fact that notice was not given as ordered by the court is amply proved as the records of the Boston *Courier* conclusively show. (Record p. 4.)

The above statute is as imperative as that other section of the statute [Rev. Stat. of Mass., Ch. 71, Sec. 19.—Gen. Stat. of Mass., Ch. 102, Sec. 43.—Pub. Stat. of Mass., Ch. 142, Sec. 8], which provides that no license shall be in force for more than one year after the granting thereof.

See Macy v. Raymond, 9 Pick., 285, where it was held that a deed of real estate by an administrator under a license to sell real estate of his intestate for the payment of his debts, must be executed and delivered within the year; otherwise it will not pass the land.

We maintain that the want of the notice in the manner ordered by the probate court is fatal to the whole proceedings and that the sale thereunder is void.

As illustrative of the necessity of notice to the ward, in an early case it was held that upon a petition of a guardian for authority to sell the real estate of his ward for the payment of his debts, accompanied with a certificate from the probate office that the facts alleged are true, the court will order notice to the presumptive heirs of the ward before granting the petition.

Ex-parte Lufkin et al., Guardians, 3 Mass., 398.

The statute in regard to notice above quoted is imperative in its terms, and the plaintiffs claim that it must be complied with strictly in order to give the court jurisdiction over the persons interested in the estate, the ward as well as every other person. Not until a full compliance with its orders, does the Probate Court stand in a position to hear and determine the matter of the petition or to pass any valid order or decree therein allowing a sale.

If the court order a notice to be given in a certain mode, and that mode is not complied with, all the proceedings following are void, because jurisdiction has not attached; for the statute asys that "No license shall be granted, until notice by public advertisement or otherwise, *as the court shall order, shall have been given* to the next of kin of the ward, and to all persons interested in the estate, to appear and show cause why the same should not be granted." If the court did not acquire jurisdiction in order to license a sale, then the whole proceedings are *coram non judice* and are absolutely void.

Corwin v. Merritt, cited *supra*.
Townsend v. Callant, 33 Cal., 45.

Mohr v. Tulip, 40 Wis., 66.
Gibbs v. Shaw, 17 Wis., 197.
Bloom v. Burdick, 1 Hill, 139.
Smith v. Rice, 11 Mass., 511.
Good v. Morley, cited *supra*.
Blodgett v. Hitt, 29 Wis., 169.

In *Corwin* v. *Merritt* (*supra*) it was held that the surrogate's court is a creature of the statute, and being a court of inferior and limited jurisdiction, those claiming under its decree must show affirmatively that the surrogate had authority to make such decree, and that the facts upon which he acted gave him jurisdiction. Every statute authority in derogation of the common law to divest the title of one person and transfer it to another must be strictly pursued or the title will not pass.

It is necessary upon an application to a surrogate for an order directing the sale of real estate, that the order made by the surrogate requiring all persons interested in the real estate to appear and show cause against the order for the sale thereof, should be duly published. This is necessary to give the surrogate jurisdiction to make the order of sale. And if such publication is not made, the entire proceedings before the surrogate are *coram non judice*. Such notice to appear is in the nature of first process, to summon the parties, and is indispensable to enable the surrogate to get jurisdiction of the persons of the parties interested in the proceedings.

Those claiming under a decree of a court of this character must show affirmatively that the court had authority to make the decree and that the facts upon which it acted gave jurisdiction.

So also throughout the whole body of the law where a statute would divest a person of his property by proceedings in a court of limited jurisdiction created by a statute law, the court must first obtain jurisdiction over the persons interested, and the law must be strictly complied with, or the proceedings will be void, and no title pass thereunder.

Thatcher v. Powell, 6 Wheat., 119.

In the case of Smith v. Rice, 11 Mass., 511, Mr. Justice Jackson says: "If it appear that the judge of probate has exceeded his authority; or that he has undertaken to determine the rights of parties over whom he has no jurisdiction; whether the want of jurisdiction arise from their not having been duly notified, not regularly before him, or from any other cause; or that he has proceeded in a course expressly prohibited by law; in all such cases the party aggrieved, if, without any laches on his part, he has had no opportunity to appeal, may consider the act or decree as void. The de-

fect is not confined to what may be considered strictly a want of jurisdiction of the cause; but if the inferior tribunal proceed in a manner prohibited, or not authorized by law, the proceeding is void." The case was a writ of entry where the demandant sought to recover one-fourth part of the land divided by commissioners appointed by a judge of probate to divide the land of a deceased intestate, and the commissioners assigned the whole to a female heir, there being a male heir, the demandant, who was absent at the time from the commonwealth, and to whom no notice of the proceedings was given and for whom no agent was appointed, as the statute required; the proceedings were held void as to such male heir, who recovered his purparty of the land.

See also Peters v. Peters, 8 Cush., 543.
Jenks v. Howland, 3 Gray, 536.

As further illustrative of the necessity of notice it has been repeatedly held in Massachusetts than in order to give the probate court jurisdiction to appoint a guardian of one *non compos*, notice be given to the party before the court can appoint one, even where there is no statute requiring notice;

Chase v. Hathaway, 14 Mass., 222.

and that a decree of a judge of probate appointing such a guardian, without notice, is absolutely void.

Hathaway v. Clark, 5 Pick., 490.
See also Allis v. Morton, 4 Gray, 63.

Taking the statute of Massachusetts above quoted, we maintain that the probate court did not acquire jurisdiction of the person or persons interested in this real estate on account of the material defect in complying with the order of the court.

(2.) The second defect is exhibited in the failure of the guardian to comply with the decree of the probate court granting the license to sell.

The record discloses that the guardian failed to name the time and place of sale in his advertisement of sale as ordered by the court, as evidenced by the notice set forth in his affidavit.

Record, p. 26, Exhibit G.

This is a vital, material and fatal error. A sale, the notice of which was so defective, would be and was void, and the purchaser would acquire no title thereunto.

Wellman v. Lawrence, 15 Mass., 326.
Compare Crowley v. Hyde, 116 Mass., 589-591.

(3.) Invalidity of sale for want of legal consideration, for violation of order of probate court, and for violation of statute law.

The sale was made by the guardian to Henry Tallman for the expressed consideration of fourteen hundred dollars, but the record discloses that Henry Tallman immediately, on the same date, (Record p. 5,) mortgaged about one-fourth part of the same estate back to Charles McIntyre, guardian of Peleg Tallman. The record discloses that the sale was not a *bona fide* sale. The guardian evi. dently did not receive a fair equivalent for the property. He did not receive but one hundred dollars for the property, and a mortgage of about one-fourth part from Henry Tallman. This did not amount to a *bona fide* sale, and the purchaser would not derive any title from the guardian.

The statute of Massachusetts prescribes as to the requisites of a valid sale that the premises must be held by one who purchased them in good faith.

Rev. Stat. of Mass., Ch. 71, Sec. 38, Fifth.
Gen. " " " Ch. 102, Sec. 47, "
Pub. " " " Ch. 142, Sec. 18, Fourth.

See also Statute of 1840, c. 97.

It is not good faith for a life tenant to procure, as was done in this case, a sale of the interest of his infant remainder-man, and then not pay to the guardian the purchase money bid therefor, but to substitute a mortgage, and that, too, a mortgage of only one-fourth of the premises purchased. The guardian had no right to allow any such substitution. If the money was not paid, there was no sale, and no title passed. The license of the probate court had been violated, and there was no sale, and no title passed. The purchaser would not be protected, nor would his subsequent grantees. The sale bore upon its face marks of a fraudulent character, and the sale of a minor's property must be above suspicion, or there will be no devestiture of title.

Again, the license of the court was to sell the property. It was not to convey and to take a mortgage back for the purchase money. The term sale is one of precise legal import. It means a contract between parties to take and to pass rights of property for money, which the buyer pays to the seller for the thing bought and sold.

Williamson vs. Berry, 8 How., 495.

This did not amount to a sale as contemplated in the license of the court to sell.

Williamson vs. Ball, 8 How., 566.
McManus vs. Rice, 48 Iowa, 361.

One of tbe requisites to a valid sale was violated at the outset, and such fact appeared on the record; the purchaser would not therefore be protected in his purchase.

(4.) No return of proceeds of sale was made to court of probate.

The statute of 1840, c. 97, provides that a sale made by a guardian shall be valid when drawn in question by any person claiming under the ward, if the license, bond, oath and notice have been according to law, and *the price for which the land shall have been bid off at auction has been paid by a bona fide purchaser, and duly accounted for*.

The record in this case discloses that no account of this sale has been rendered to the probate court, (Record p. 5, Ex. K., p. 31,) and that in fact no money, so far as the record discloses, has been paid to the guardian. The Supreme Judicial Court has held a sale of this character void as to the minor, and the title still to remain in the minor.

Richmond vs. Gray, 3 Allen, 25, 27.

And upon that statute, which was in force at the time of this attempted sale, together with the Judicial authority of the Supreme Judicial Court in the case last cited, upon the construction of that statute, we claim that the minor was never divested of his title by that attempted sale.

(5.) Title was not complete in purchaser at guardian's sale without the filing of affidavit of guardian setting forth the time and place of sale, within the time prescribed by statute.

Rev. Stat. of Mass., Ch. 72, Sec. 12.
" " " " Ch. 71, Sec. 16.

The plaintiffs, therefore, maintain that they were not divested of their title derived as heirs at law of Peleg Tallman, Jr., under and by

tue of the proceedings instituted in the probate court by the latter's guardian, but that their title remains intact under the will of Peleg Tallman, (Sr).

Respectfully submitted,

THOMAS A. JENCKES,
JAMES E. LEACH,

Of Counsel for Plaintiffs in Error.

Office Supreme Court, U. S.
FILED.
DEC 13 1894
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 122

WILLIAM A. SWEET ET ALS.

v.

CHRISTIAN RECHEL.

BRIEF FOR DEFENDANT.

SAMUEL J. ELDER,
CHARLES T. GALLAGHER, } *of Counsel.*

BOSTON:
PRESS OF SAMUEL USHER,
171 DEVONSHIRE STREET.
1894.

Supreme Court of the United States.

No. 122. October Term, 1894.

WILLIAM A. SWEET *et als.*

v.

CHRISTIAN RECHEL.

DEFENDANT'S BRIEF.

The plaintiffs seek to recover land in the heart of Boston, of which neither they nor their ancestors have had the occupation for upwards of forty years, and to dispossess one who with his grantors has openly held, occupied, and greatly improved the same during that period.

To accomplish this result the plaintiffs must show first, that the deed of the guardian of Peleg Tallman, Jr., in 1844, was void, and, second, that the taking of the land by the City of Boston under Statute of 1867 was ineffectual.

Both of these questions are open upon the record.

The judgment is that the "plaintiff take nothing by their "said writ," and that defendant recover his costs (p. 34).

The assignment of errors is, "The Circuit Court ruled that "the plaintiff could not recover, which ruling the plaintiffs claim "to be erroneous." (p. 36.)

It is true that Colt, J., in his opinion, discusses only the validity of the taking of land by the City of Boston, and on that point decides in defendant's favor, deeming "it unnecessary to "enter upon any inquiry as to the validity of the guardian's deed. "Judgment for defendant" (p. 36). It is the ruling and not the opinion to which errors can be assigned.

I.

THE GUARDIAN'S DEED.

(1) It is claimed by the plaintiff that the Probate Court had no jurisdiction to order the sale of 1844, because, as it is alleged, the notice of the petition for leave to sell was published in the *Boston Courier* twice, and not three times, as directed by the Court.

The Probate Court sitting at the time the order of notice was returnable found as a fact that "the next of kin and all persons "interested in the estate of said minor or in the subject matter of "said petition have been duly notified thereof." (Record, Exhibit E, p. 24.)

This Court is asked after fifty years to reverse that finding. In the first place, can it do so? This question has already been fully dealt with by the Massachusetts Supreme Judicial Court in

Thomas *v.* LeBaron, 8 Met. 355.

Where the legislature leaves to the Probate Court to fix the length of notice to be given to next of kin, etc., the Probate Court is the proper tribunal to judge of the giving of the notice, and the decree of the judge is conclusive on all parties interested, including minors who did not show that they had no guardian when the notice was ordered (pp. 361, 362).

In the case at bar the time and manner of giving the notice are left to the Probate Court.

"No such license shall be granted until notice by public adver- "tisement, or otherwise, as the Court shall order, shall have been "given to the next of kin of the ward, and to all persons inter- "ested in the estate to appear and show cause why the same "should not be granted."

Revised Stats. Mass. Chap. 72, sec. 8.

Title "Of the sale of land of minors and of other persons "under guardianship and securing the proceeds for their use."

Gen'l Stat. ch. 102, sec. 39.
Pub. Stat. ch. 140, sec. 15.

And there were no minors interested in the estate, except Peleg Tallman, Jr., whose guardian brought the petition.

"A license to sell real estate is not to be held void by reason of "anything which affects only the mode of proceeding. . . . The "heir, or other party claiming the land, is precluded from going "behind the formal decree and license of the Court."

~~Hamblin *v.* Day, 105 Mass. 87, 89.~~

The United States Courts will follow the State Courts upon a question of the State Courts' procedure.

Colt *v.* Colt, 111 U. S. 578.

It is to be observed that the notice prescribed by statute is not for the purpose of bringing the minor into Court, as the plaintiff's brief supposes. He is already in Court, and the Court stands *in loco parentis* to him. The notice required by statute is "to the next of kin of the ward, and to all persons interested in the estate." Rev. Stat. ch. 72, sec. 8.

And another section, Rev. Stat. 71, sec. 29 (Pub. Stat. 140, sec. 16), provides that "heirs apparent or presumptive of the ward "shall be considered as interested." So that it is not for the ward or his descendants to complain of the lack of notice, because he was entitled to none. His rights were to be guarded by the Court. The only persons who can object to want of notice are those who were entitled to receive it or their heirs.

Again, who were the "persons interested" and entitled to notice as thus defined? Peleg Tallman, Jr., was seven years of age. (Exhibit B, p. 20.) His heirs apparent and presumptive were his father and mother. They are both estopped to deny that the notice was duly given because, the property being conveyed to the father by the guardian's deed, both joined in conveying it in mortgage, March 25, 1844, and to Robert Knott in fee October 5, 1844. (pp. 28, 29.)

Even if the question were open, would this Court overrule the finding made by the Probate Court at the time of the notice? The proper evidence that due publication has been made is the affidavit of the guardian upon the original order of notice. This affidavit was made before the Judge of Probate, December 25, 1843. (Exhibit D, p. 23.)

In Thomas *v.* LeBaron, *supra*, the Court says: "After such a "lapse of time" (in that case twenty-four years, and in this case fifty years) "the sufficiency of a notice certified by a Court com- "petent to decide upon it at the time of receiving it will not be "questioned without plenary evidence."

The evidence to impeach the finding in this case is that a single file of the *Boston Courier* contains only two of the three notices. (p. 5.) No person is called to show that only one edition of the paper was published daily. It is left entirely probable that the affidavit of the guardian was true and the finding of the Court correct, for an advertisement in either the morning or evening or any edition would be full compliance with the order of notice.

Finally, it is not necessary that a guardian *ad litem* should be appointed to make the sale valid.

Holmes *v.* Beal, 9 Cush. 223–226.
Colt *v.* Colt, *supra*.

(2) The second alleged defect is that the time and place of the intended sale are not set forth in the advertisement of sale. This objection seems somewhat overnice. The notice published (Exhibit G, pp. 25, 26) states the time as "Wednesday, the twentieth "day of March, at 4 o'clock P.M." And the place as "a lot of "land lying on Pleasant Street Court, in said Boston, measuring "on said court about 147 feet, westerly on Church Street about 50 "feet; southerly on land now or late of Mrs. Blake, about 147 "feet, easterly on land now or late of J. N. Howe and Deborah "Parker about 50 feet, with two brick houses and a wooden "house on the same."

This clearly fixes the place as on the southeasterly corner of Pleasant Street Court and Church Street, and the two brick houses and a wooden house are sufficient landmarks. Certainly no one could have been mistaken or misled by the omission of the words "on the premises," for the *place to be sold* is clearly the *place of sale* when no other is mentioned. The notice is intended to give information to buyers, and no intending purchaser could have doubted where to go. Exact legal nicety of expression is not required, but the clear statement of time and place. The deed shows that the sale was upon the premises. (Exhibit H, p. 27.)

Notices which enable purchasers of ordinary intelligence to ascertain the time and place of sale are not defective, though there are omissions and even positive errors in the writing.

New Eng. Hospital *v.* Sohier, 115 Mass. 50.
Brigham *v.* Boston & Albany R. R., 102 Mass. 14–18.
Wyman *v.* Hooper, 2 Gray, 141–147.

The same is true in notices of the time and place of mortgagee's sales.

Colcord *v.* Bettinson, 131 Mass. 233.
Model Lodging House Asso. *v.* Boston, 114 Mass. 133–8.

(3) The plaintiffs accuse their grandfather of lack of good faith to his infant son in the purchase of his interest in the property. The charge rests upon the fact that the sale was made to the father of the ward and that a mortgage of a quarter of the property was taken back to secure $1,300 of the purchase money. It is to be remembered that the ward's interest was a remainder after the father's life estate, and that such an interest was of greater value to the father than to any one else, as it gave him the absolute ownership of the property, and also that the sale was made for the purpose of reinvestment.

This purpose was immediately accomplished by the taking of the mortgage. And the security seems to have been ample. A mortgage in fee upon a quarter of the property was certainly of more value than a remainder over after a life estate which, as the event showed, had forty-one years to run, the life tenant being then thirty-eight years of age (p. 3). It does not appear that the mortgage was not paid at maturity. And the ward was further secured by a bond for $3,000 with sureties, approved by the Judge of Probate. (p. 5.) The property at the sale brought within one hundred dollars of its inventory value (pp. 4, 5). So far from there being any evidence of fraud upon the ward, it appears that the Probate Court acted wisely in reducing this decaying and unproductive property to cash, the property brought its full value, the purchaser was the one whom the Court with all the facts before it must have known to be the natural and probable one, the value was by one transaction reinvested as the Court

had ordered, and the ward had the triple security of his father's note, of a mortgage in fee upon property which is not shown or suggested to be of inadequate value, and of a good bond for $3,000. If such a title can be impeached, no purchaser is safe.

No case is cited to the point that a purchase either by a life tenant of the interest of an infant remainder-man or by a father of the rights of his infant son is invalid. Even if the guardian had been directly or indirectly the purchaser, the sale would not be held void in this action, *a fortiori* a purchase by a stranger to the guardian's trust.

Yeackell *v.* Litchfield, 13 Allen, 417.

It certainly is a novel proposition that a sale and conveyance of real estate is *not a sale* if a mortgage for the purchase money is taken back.

The cases cited by the plaintiffs do not support that proposition. Williamson *v.* Berry, and Same *v.* Ball turn upon the construction of two New York statutes which authorized one Thomas B. Clark to sell certain real estate in which his children had a remainder over, invest the proceeds, and "apply the whole of the interest "and income of said property to the maintenance and support of "his family and the education of his children." He actually did convey portions of the real estate in payment of his own preëxisting debts, and in the purchase of tax titles, etc. The Court held that this was not a sale within the meaning of the statutes.

It is usually safe and proper, even as between a guardian and his ward, to sell on credit and take back mortgage security on the property sold, or on other property, without the payment of the purchase money in cash.

Fay *v.* Taylor, 11 Met. 531–534.
Lovell *v.* Minot, 20 Pick. 116.

And even when bad judgment is used by the guardian and he is required to account for losses, the title to the property sold is not called in question.

Harding *v.* Larned, 4 Allen, 426.

(4) Richmond *v.* Gray, 3 Allen, 25, decides that where the guardian's deed was not delivered within one year, and where no money or anything else had been paid to the guardian or accounted for in court, no title passed.

The title was held bad because the guardian's authority had expired before he exercised it, and the defendant was not prevented from setting up the defect by the prohibitive statute of 1840, chapter 97, because no consideration had actually been paid or accounted for. It is to be observed that the Statute of 1840 does not create new prerequisites to the validity of guardians' sales, but provides that in certain circumstances they shall not be called in question.

It is therefore not necessary to the validity of a guardian's sale that a return of proceeds should be made to the Court. It would be unreasonable to require a purchaser to compel a guardian to do his duty after the purchase, and the new bond given when the license to sell is granted protects the ward.

(5) Rev. Stat. ch. 72, sec. 12, and ch. 71, sec. 16, provide a convenient method of perpetuating evidence that the notice of sale was duly given. But they do not preclude proof in other ways. See Thomas *v.* LeBaron, *supra*, p. 364, where the case was opened to admit oral evidence that the notice was actually given as required. It is the giving of the notice, not the perpetuation of the evidence that it has been given, that is essential to the validity of the sale. And the agreed statement (p. 5) states that notice was actually given, so that other proof was unnecessary.

The Legislature by Stat. 1853, ch. 393, provided that after the lapse of the year, with the consent of the Probate Court, evidence may be perpetuated. And this method of perpetuating the evidence was availed of in this case. (Exhibit G, Agreed Statement, p. 5.)

No other flaws are suggested.

Pub. Stat., ch. 142, sec. 18, provides: "No sale of real estate "made by an executor, administrator, guardian, trustee, or other "person by license of Court, and no title under such a sale shall "be avoided for the reason that the deed was not delivered within "one year after the license, or on account of any irregularity in "the proceedings, if it appears,

"*First*, That the license was granted by a court of competent "jurisdiction.

"*Second*, That the person licensed gave a bond which was "approved by the Judge of the Probate Court, if a bond was "required upon the granting of the license.

"*Third*, That the notice of the time and place of sale was given "according to the order of the Court; and

"*Fourth*, That the premises were sold by public auction in "accordance with the notice and are held by one who purchased "them in good faith."

The license was granted by the Probate Court for Suffolk County, which had "jurisdiction of the subject-matter." (Agreed Facts, p. 4.) The person licensed gave a bond which was approved by the Judge of the Court. (Agreed Facts, p. 5, and Exhibit F, p. 24.) Notice of the time and place of sale was given according to the order of the Court. (Agreed Facts, p. 5.) The premises were sold by public auction in accordance with the notice. (Agreed Facts, p. 5.) And the premises are held by the defendant, "Rechel, who bought the premises in good faith for "full value." (Agreed Facts, p. 6.)

It is to be observed that the good or ill faith of Henry Tallman is not important, but the good faith of the person by whom "the "premises are held."

This statute applies to past as well as to future sales, and seems to be conclusive of this case.

Cooper *v.* Robinson, 2 Cush. 184–190.

(6) The defendant also claims that this case comes within the authority of

Nott *v.* Simpson Mfg. Co. 142 Mass. 479,

so far as that, the facts here raise an equitable defence to this action. This action is brought against a bona fide holder of land who took the same without actual notice of any of the alleged defects in title. It would appear that this title might be cured by proceedings under Pub. Stat. ch. 142, sec. 22, and that the case would be covered by the statement in the last quoted case that "when facts appear which would warrant a confirmation and an "injunction against proceeding with this action if the tenant "brought a bill, they constitute an equitable defence none the "less that a bill is still necessary before the tenant can receive "affirmative relief."

We claim here that the statute of Mass. 1883, ch. 223, sec. 14, is applicable, which says that "In actions of law . . . the defend- "ant shall be entitled to allege as a defence any facts that would "entitle him in equity to be absolutely and unconditionally relieved "against the plaintiff's claim or cause of action."

If the facts as shown in the agreed statement are not already sufficiently pleaded, the Court, it is assumed, would allow a proper amendment for the purpose.

II.

(1) The Mass. Stat. 1867, ch. 308 (Record pp. 6, 7), authorized the City of Boston to abate a nuisance and to preserve the public health, to "take the lands" within a large district of which the land in question was a part and to abate the nuisance; and provided that "the title to all the land so taken should vest in the "City of Boston." The act provided for payment of damages to owners by the city and allowed any person whose land was affected to bring a bill in equity to enforce payment. The city took the land, including the land in question, and, as provided in the act, filed a description of the same in the Registry of Deeds of the County of Suffolk (Record, p. 9).

The city completed the improvement contemplated by the act by raising the grade of the entire territory at great expense, thereby abating the nuisance (p. 9).

The city thereafter made the deed under which defendant claims; the defendant was in actual possession of the demanded premises at the time this action was brought.

(2) The Constitution of Massachusetts, Declaration of Rights, Article 10, provides that "whenever the public exigency requires

"that the property of an individual be appropriated to public uses . . . he shall receive reasonable compensation."

This article has been often construed by the Massachusetts Supreme Court, which has held that it is sufficient compliance therewith if provision be made for ascertaining the damage. In case a county, city, or town is to pay the same, and the liability to pay rests upon the whole property of the inhabitants and may be enforced by writ of execution, warrant of distress, or mandamus to compel the levy of a general tax, the protection guaranteed by the Constitution is held to be secured.

Haverhill Bridge Proprietors *v.* County Commissioners, 103 Mass. 120.

When taken by the Commonwealth directly for public uses it is not needful that the State be subject to compulsory process for collection of the money. It is sufficient if the statute authorizing the taking direct the damages assessed to be paid from the treasury of the Commonwealth and authorizes the governor to draw a warrant therefor, because "it is an appropriation of so much money." It is a pledge of the faith and credit of the Commonwealth.

Talbot *v.* Hudson, 16 Gray, 417, 431.

Even in the case of a quasi-public corporation the Court has held, where an aqueduct company was authorized to take property for the purpose of supplying a locality with water, that "the "question whether the provision for compensation furnished by "statute is an adequate one is a practical question," and that the remedy given by a statute providing a tribunal to assess damages on application by an owner, "supplemented by remedies afforded "by the general laws, if it (the company) refuses to pay the "damages assessed, affords to any person whose property is taken "or injured by the acts of the corporation a reasonable certainty "that he will recover and receive compensation therefor."

Brickett *v.* Haverhill Aqueduct Co., 142 Mass. 397.

(3) Where an act authorizing an appropriation provides a specific remedy to a landowner, by which the amount of his compensation is to be ascertained, that method is exclusive.

"The statutory remedy is the only remedy to which the "injured party can resort for acts done within the authority of "the statute."

Brickett *v.* Haverhill Aq. Co., *supra.*
Dodge *v.* Comm'rs, 3 Met. (Mass.) 380.

(4) In the case at bar the land was actually taken by the city of Boston under Stat. 1867, ch. 308, on May 9, 1868, and on May 22, 1868, the city filed an accurate description of this land taken in the Registry of Deeds for Suffolk County. The description is

the same as used in the plaintiff's writ. This furnishes conclusive evidence of the taking by the city. Bigelow, J., says in Moore *v.* City of Boston, 8 Cushing, 278: "By the act of taking, the title "of the owner of the land is divested and that of the respondent "is created, and all that is left to the former is his claim for "compensation."

(5) Where the description filed accurately identifies the land the name of the owner is immaterial.

Woodbury *v.* Marblehead Water Co. 145 Mass 512.
Grand Junction Railroad, . . . Co. *v.* County Comm'rs, 14 Gray, 553.

(6) The Statute of 1867, ch. 309, has been passed upon, and substantially the whole question has already been decided by the Massachusetts Supreme Court in

Dingley *v.* City of Boston, 100 Mass. 544.

This was a bill in equity brought by an owner of land to restrain the city of Boston from erecting thereon a building, to be used by the defendant as a wardroom and hosehouse.

The issue on the answer of the defendant was whether a title in fee simple passed to the defendant under that act, and whether, having taken the lands for abatement of a nuisance, and having abated the nuisance, the land might be used by the city for a purpose other than the immediate purpose of the act.

It was held that the city acquired a title in fee simple in the land taken under the act. Chapman, C. J., says: "On the whole, "therefore, the plan of compelling the city to take the land in "fee simple . . . would be the most simple. . . . If, for exam- "ple, in time of war the government were to take timber for a "ship of war, or horses for the army, and pay for them, no one "would suppose that the owner could reclaim his property after "the war was over, or that the government, having ceased to use "it, could not sell it and give a good title to it." (pp. 559, 560.)

This decision conclusively establishes that under this act the city took a title in fee simple, free from any possibility of reverter left in the original owner of the land.

This statute was again before the Court in

Cobb *v.* City of Boston, 109 Mass. 438,

and the decision in Dingley *v.* Boston was reaffirmed. This was a bill in equity brought in 1869 and was pending till the April term, 1882, on behalf of owners of land in this district and of all who might join with such owners. In this case, on December 23, 1869, it was ordered by the Court that the time intervening from December 23, 1869, to the first Tuesday of April, 1870, be allowed all parties to become parties thereto (Record, p. 12). Many owners came in on notice and had their

damages assessed. The case at bar is certainly one where the city could not know of ownership without notice from the alleged owner; he alone could know the fact of his sustaining damage.

This case of Cobb *v.* Boston was pending nearly a year and a half after Frank G. Tallman became of age, and on a proper petition the Court would have allowed him to enter for himself and for his brother a claim for damages.

Where there exists a public use or public necessity, as decided by the Legislature, a responsible body like a town to exercise the right, the means of ascertaining and compelling payment on the part of the owner, the exercise of the right of taking land by such authorized body, the Massachusetts decisions hold that the title passes and there is left to the owner only the *chose in action* — which may be barred by a neglect to exercise it within the statutory time.

This too seems the more reasonable doctrine where a great public improvement is actually carried out by a city. Where compensation is reasonably sure on application, it is the fault of the owner if he neglects to apply seasonably. The opposite doctrine would permit a landowner to balk a public improvement by refusing or failing to use the means provided by statute to get his pay, and then claim that, payment being required to pass the title, he might recover the land in such an action as the present. The practical impossibility of truly ascertaining the real owner of contingent interests, as in this case, is another practical reason for throwing the burden of taking the initiative to compel payment upon those claiming to be owners. The city here dealt with the apparent owner in possession, and the guarantee of the city should be protected.

(7) The city might alien land held by it in fee simple.

Dillon on Municipal Corp. (3d ed.), sec. 575.
Beach *v.* Haynes, 12 Vt. 15.

Here from the construction of the act it must have been the intent of the Legislature that the city might sell, and the question what the consideration of the sale was is immaterial in this action.

Bachelder *v.* Wakefield, 8 Cush. 247.
Commonwealth *v.* Wilder, 127 Mass. 6.
Chase *v.* Sutton Mfg. Co., 4 Cush. 171.

(8) The tenant is in possession claiming the legal title and the presumption from possession is that the possessor owns absolutely.

The tenant being in possession, the relation of landlord and tenant not having existed between the plaintiff and the defendant, the plaintiff must establish a legal title in himself. He must prevail not by the weakness of the tenant's title, but by the strength of his own title.

Here the title of the plaintiff, if any existed May 9, 1868, was

divested and vested in the City of Boston at that date by the taking under Stat. 1867, ch. 308.

Even if the city might not legally part with its title, yet the defendant's possession under claim of legal title is sufficient defence either in an action or ejectment or writ of entry.

Preston's Heirs *v.* Bowmar, 6 Wheat. 580.
Adams on Ejectment, p. 275.*
Ricard *v.* Williams, 7 Wheat. 59.

(9) The question here involved is the title to real property as affected by State Statute, and the Federal Court must apply State law as the State Courts would do.

Erie R. R. Co. *v.* Pennsylvania, 21 Wall, 492, at p. 497.

Hunt, J., says: "This construction of a State statute by the "Supreme Court of the State . . . is conclusive on us. We "accept and adopt it, although we may have already accepted and "adopted a different construction of a similar statute of another "State, in deference to the Supreme Court of that State."

See also Williams *v.* Kirtland, 13 Wall, 306.

In Barrett *v.* Holmes, 102 U. S. 655, Woods, J., says: "The "Supreme Court of the State has established a rule of property "in the State of Iowa which is binding on this and other courts "of the United States."

This rule is even carried so far that, after a decision of the Federal Court in conformity to a State Court decision, if the State Court changes its views, the Federal Court must also change.

Supervisors *v.* United States, 18 Wall, 71.
Beauregard *v.* New Orleans, 18 How. 497.

The case of Kennedy *v.* Indianapolis, 103 U. S. 599, chiefly relied on by plaintiff, is easily distinguished. There the public use for which land was taken was building a canal. This purpose had not been carried out and had been abandoned.

The public use never existed, because the purpose for which the act was passed had been abandoned. The United States Court interpreted the Indiana Constitution and followed the Indiana decisions and is not here applicable. Though the distinction is recognized between reversion of title once acquired and the acquisition of title, the Court assumed that if once acquired it would not revert.

The case of Dingley *v.* Boston, above cited, proves that title had been acquired.

(10) The claim of the plaintiff that no Massachusetts case holds that a title will pass before compensation has been paid is plainly met by the case of

Brock *v.* Old Colony Railroad Co., 146 Mass. 194.

This was a writ of entry to recover a parcel of land in Stoughton.

The plaintiff owned the tract of land, bounded easterly by land of O. Ames & Son.

A location was filed by the Eastern Branch Railroad Company, to whose rights and liabilities the Old Colony Railroad succeeded, by which the land was identified, but the name of the owner nowhere appeared. The railroad did not fence or occupy the premises until some years later, when the owner first had actual notice of his land being claimed by the railroad under the location. The owner never received any damage or compensation for the taking of his land.

Holmes, J., says: "The location identified the land and there-"fore satisfied the statute. Rev. Stat. 39, sec. 75. Filing was "sufficient notice of the taking. . . . As pointed out by the tenant "it must be presumed that the demandant was notified of the "petition for authority to take as required by Rev. Stat. ch. 39, "sec. 46–48. . . . It would be impracticable to make the validity of "a taking depend upon notifying all owners personally by name, "and in proceedings *in rem* of this sort it is not necessary. In "view of the above decisions we do not think it requisite to do "more than cite a few cases from other States which sustain, or go "beyond, our opinion. The failure to furnish a plan did not affect "the tenant's title nor suspend the running of the time for apply-"ing for damages which has long gone by."

See also

Cupp *v.* Commissioners of Seneca County, 19 Ohio, 173.
Georges Creek Coal . . . Co. *v.* New Central Coal Co. 40 Md. 438.

In this case the Court says: —

"However important notice in such cases may be, it is sufficient "... that the lawmakers have not made it a prerequisite to "the validity of the proceedings. It is probable the Legislature "thought the construction of such works of public interest ought "not to be delayed by the necessity of giving notice to parties "*sui juris* and nonresidents of the county where lands to be con-"demned were situated."

(11) The receipt of compensation by the owner of land is wholly immaterial where as in this case the land is taken to abate a nuisance under the police power of the Commonwealth. Statute 1867, ch. 308, under which this land was taken, is entitled: —

"An act to enable the City of Boston to abate a nuisance "existing therein and for the preservation of the public health in "said city."

Section 4 provides that "the city shall raise the grade of said "territory so taken . . . with reference to a complete drainage so "as to abate the present nuisance and to preserve the health of "the city." (Record p. 6.)

Bancroft *v.* City of Cambridge, 126 Mass. 438, was a precisely similar case, where the City of Cambridge under a statute passed "with reference to a complete drainage thereof so as to abate "and prevent nuisances and to preserve the public health," was held to be authorized, first to grade, and finally "to take" land in the district in case the owner did not pay the assessment for grading.

The Court says, p. 441: —

"Nor is the statute made unconstitutional by this construction. "It is entitled An act to provide for the prevention and abatement "of nuisances and the preservation of the public health. It was "not passed to delegate the right of eminent domain but under "the police power of the Commonwealth. Laws passed in the "legitimate exercise of this power are not obnoxious to constitu- "tional provisions merely because they do not provide compensa- "tion to the individual who is inconvenienced by them. He is "presumed to be rewarded by the common benefits secured. In- "stances of its exercise are found in all quarantine and health "regulations, and in all laws for the abatement of existing and "prevention of threatened nuisances."

And many cases are then cited; as where liquor or milk seized is not paid for, or the owner of land along the seashore is prevented from taking gravel therefrom because it would render adjoining land liable to the inroads of the sea.

This case of Bancroft *v.* Cambridge has since its decision been often cited, and disposes of the claim that compensation is a condition either precedent or subsequent to title vesting in the city to land taken under Stat. 1867, ch. 308.

CHARLES T. GALLAGHER,
SAMUEL J. ELDER,
for Defendant.